TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 225.

ALEXANDER R. STALKER AND EMALINE STALKER,
PLAINTIFFS IN ERROR,

vs.

OREGON SHORT LINE RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

FILED MARCH 9, 1910.

(22,056)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 25, 1912.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Idaho, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Oregon Short Line Railroad Company, plaintiff, and Alexander R. Stalker and Emaline Stalker, defendants, wherein was drawn in question the validity of a treaty or statute, of or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said Alexander R. Stalker and Emaline Stalker, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be
2 therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 15th day of February in the year of our Lord one thousand nine hundred and ten.

[Seal United States Circuit Court, Idaho.]

A. L. RICHARDSON,
Clerk Circuit Court United States,
District of Idaho.

Allowed.

ISAAC N. SULLIVAN,
Chief Justice Supreme Court of Idaho.

3 UNITED STATES OF AMERICA,
Supreme Court of Idaho, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Idaho, in the City of Boise, this 18th day of February, 1910.

[Seal of Supreme Court, State of Idaho.]

I. W. HART,
Clerk of the Supreme Court of Idaho.

Costs of Suit.

Plaintiff's Costs.....	$13.80,	p'd by A. R. Stalker and Emaline Stalker.
Defendant's Costs.....	27.25 "	" Oregon Short Line Railroad Company.
Costs of Transcript.....	41.95 "	" A. R. Stalker and Emaline Stalker.

I. W. HART,
Clerk Sup. Ct. of Idaho.

4 & 5 In the Supreme Court of the State of Idaho, November Term, 1906.

No. 1270.

OREGON SHORT LINE RAILROAD CO., Respondent,
vs.
A. R. STALKER and EMALINE STALKER, Appellants.

Transcript on Appeal.

On Appeal From the District Court of the Third Judicial District of the State of Idaho in and for Ada County.

Hugh E. McElroy and Frank Martin, Attorneys for Appellants.
P. L. Williams, F. S. Dietrich, and Wyman & Wyman, Attorneys for Respondent.

Filed Jan. 10, 1907. Ola Johnesse, Clerk.

6 In the District Court of the Third Judicial District of Idaho in and for the County of Ada.

OREGON SHORT LINE RAILROAD CO., a Corporation, Plaintiff,

vs.

WILLIAM H. ROWAN, JOSEPH MILLS, CHARLOTTE A. MILLS, A. R. Stalker and Emaline Stalker, His Wife, and Mary L. Dunkin and E. G. Dunkin, Her Husband, Defendants.

Complaint.

Comes now the plaintiff, and for cause of action against the above named defendants, alleges:

I.

That the plaintiff is, and for many years immediately last past has been, a corporation, organized and existing under and by virtue of the laws of the state of Utah, the same being a railroad
7 corporation, owning and operating a system of railroads in and through the State of Idaho and other states and at all times herein mentioned having fully complied with all of the provisions of the Constitution and Statutes of the State of Idaho relating to railroad and other foreign corporations.

II.

That ever since on or about August 1, 1888, the plaintiff and its predecessors in interest have been, and it now is, the owner in fee and entitled to the exclusive possession of that certain tract of land, situate, lying and being in the County of Ada, State of Idaho, the same being a portion of the East half (½) of the Southwest quarter (¼) of Section seven (7), Township three (3) north, Range one (1) East of Boise Meridian, more particularly described as follows, to wit:

Commencing at station 522 plus 99 on the center line of the Boise Branch of the Oregon Short Line Railroad Company, said station being 1096 feet east of the intersection of said center line with the Boise Meridian, measured along said center line; thence, 100 feet due north to place of beginning; thence due north 410 feet; thence easterly, parallel to said center line 1304.2 feet; thence due south 410 feet; thence westerly parallel to said center line, 1304.2 feet to place of beginning.

III.

8 That as above stated, plaintiff claims title in fee to the said premises, and the defendants claim estates or interest therein or in a portion thereof adverse to this plaintiff.

IV.

That the claims of the said defendants are without any right whatever, and that the said defendants have not any estate, right, title or interest whatever in said land or premises or any part thereof.

Wherefore the plaintiff prays:

First.

That the defendants be required to set forth the nature of their claims, and that all adverse claims of the defendants and each of them may be determined by a decree of this Court.

Second.

That by said decree it be declared and adjudged that the defendants have no estate or interest whatever in or to said land and premises or any part thereof, and have no right to the possession thereof and that the title of the plaintiff is good and valid and that it has a right to the exclusive possession of said premises and the whole thereof.

Third.

That the defendants be forever enjoined and debarred from asserting any claim whatever in and to said land and premises ad-
9 verse to the plaintiff and from maintaining or asserting possession of said premises or any part thereof or any right thereto, and have such other relief as to this Honorable Court shall seem meet and agreeable to equity, and for its costs of suit.

P. L. WILLIAMS,
F. S. DEITRICH,
WYMAN & WYMAN,
Attorneys for Plaintiff.

(Duly verified.)

(Title of Court and Cause.)

Answer of Defendants A. R. Stalker and Emaline Stalker.

Now comes the said defendants, A. R. Stalker and Emaline Stalker, and for answer to the complaint herein, say:

1. That at all times herein mentioned defendants were and still are husband and wife.

2. That on or about August 4, 1891, the property in controversy was duly conveyed by the United States to Joseph G. Reed; pursuant to entry thereof under the land laws of the United States; that prior to the issuance of said patent, the said Reed, on or about July 27th, 1889, after final proof, duly conveyed said premises by warranty deed to one W. H. Rowan, defendant herein; that there-
10 after and on or about March 30th, 1901, said Rowan executed a plat of a part of said property under the name of Rowan's Addition to the town of Meridian, Ada County, Idaho, and

on April 2, 1901, filed said plat in the office of the County Recorder of said County; that thereafter by intermediate conveyances, the said Rowan and his grantees duly conveyed to the defendant, A. R. Stalker, that part of said premises designated on said plat as lots 5 and 6, in block 4, in said Rowan's Addition, and to the defendant Emaline Stalker, that part of said premises designated as lots 7 and 8 in block 4 of said Addition, said conveyances being made prior to the commencement of this action, and thereupon these defendants became and still are the lawful owners of said premises, holding a fee simple title thereto.

3. Defendants further say that they deny that ever since on or about August 1, 1888, the plaintiff and its predecessors in interest have been or now are the owner- in fee or entitled to the exclusive possession of the tract of ground described in paragraph 2 of the complaint or the part thereof described in paragraph 2 of this answer.

HUGH E. McELROY,
Attorney for Said Defendants.

(Duly verified.)

Findings of Fact and Conclusions of Law.

(Title of Court and Cause.)

In this cause the defendants above named, William H.
11 Rowan, Joseph Mills, Charlotte A. Mills, and Mary L. Dunkin and E. G. Dunkin, her husband, having each been duly served with summons, and each of said defendants last named having failed to file an answer or demurrer or appearance of any kind within the time specified in the summons, and no further time having been granted, and the default of each of said defendants having been heretofore duly entered, and the defendants, A. R. Stalker and Emaline Stalker, after service of process upon them, having appeared by their attorneys, H. E. McElroy, Esq., and Frank Martin, Esq., and having answered the plaintiff's complaint herein, and thereafter, the court having heard the testimony, and having read the stipulations signed by the attorneys for the respective parties and filed herein, and counsel for the respective parties having made their arguments, and the Court being fully advised in the premises, makes the following findings of fact and conclusions of law:

Findings of Fact.

The Court finds:

I.

That the plaintiff, Oregon Short Line Railroad Company, is and for many years last past has been, a corporation organized and existing under and by virtue of the laws of the State of Utah, the same

being a railroad corporation owning and operating a system
12 of railroads in and through the State of Idaho, and other States, and at all times hereinafter mentioned, having fully complied with all of the provisions of the Constitution and Statutes of the State of Idaho relating to railroad and other foreign corporations.

II.

That ever since on or about August 1, 1888, the plaintiff and its predecessors in interest have been, and, at the time of the commencement of this action, the plaintiff was and it now is, the owner and entitled to the exclusive possession of that certain tract of land situated, lying and being in the County of Ada, State of Idaho, the same being a portion of the East half of the Southwest quarter of Section 7, Township 3 North, Range 1 East of Boise Meridian, more particularly described as follows, to-wit:

Commencing at station 522 plus 99 of the center line of the Boise Branch of the Oregon Short Line Railroad Company, said station being 1096 feet east of the intersection of said center line with the Boise Meridian, measured along said center line; thence 100 feet due north to place of beginning; thence due north 410 feet; thence easterly parallel to said center line 1304.2 feet; thence due south 410 feet; thence westerly parallel to said center line 1304.2 feet to place of beginning, including the land described in the second paragraph of the answer of the defendants A. R. Stalker and Emaline Stalker, to-wit: Lots 5, 6, 7 and 8 in block 4 in Rowan's Addition to the town of Meridian.

13 III.

That the defendants, and especially the defendants A. R. Stalker and Emaline Stalker, for some time prior to the commencement of this action, and at the time the same was commenced, claimed interests in said premises adverse to the right and title of the plaintiff. That all and each of the claims of said defendants and each of them are, and at the time of the commencement of this action were, without any right whatever, and no one of the defendants has any estate, right, title or interest, whatever, in the land and premises above described as belonging to the plaintiff.

IV.

That the defendants A. R. Stalker and Emaline Stalker were at all the times mentioned in their answer, and they now are, husband and wife.

V.

That no part of the property above described as belonging to the plaintiff was, on August 4, 1891, or at any other time, conveyed by the United States to Joseph G. Reed, or to any person or corporation except the plaintiff. That said Reed did not, by deed or otherwise, convey any portion of said premises to W. H. Rowan, and said

Rowan did not, by conveyances intermediate or otherwise, convey any portion of said premises to the defendant, A. R. Stalker, or to the defendant Emaline Stalker, and neither the defendant
14 Emaline Stalker nor the defendant A. R. Stalker, ever became or was or is the owner of said premises or any part of the premises described as being the property belonging to the plaintiff, and neither of the said defendants ever held fee simple or any title thereto.

Conclusions of Law.

And, as conclusions of law from the foregoing findings of fact, the Court finds:

I.

That plaintiff is entitled to the exclusive possession of the premises described in the complaint and the foregoing findings as belonging to it, and it is further entitled to a decree quieting its title and enjoining the defendants and each and all of them from interfering with the plaintiff's exclusive possession thereof, and from claiming title thereto, or any interest therein; and its costs in this action incurred.

Dated this 23d day of July, 1906.

GEORGE H. STEWART, *Judge.*

Decree.

(Title of Court and Cause.)

In this case the default of the defendants, William Rowan, Joseph Mills, Charlotte A. Mills, and Mary L. Dunkin and E. G. Dunkin, having been heretofore duly entered according to law, and
15 the defendants, A. R. Stalker and Emaline Stalker, his wife, having appeared by their attorneys, H. E. McElroy, Esq., and Frank Martin, Esq., and the court having considered the evidence and the arguments of counsel and being fully advised and having made and filed its findings of fact and conclusions of law;

Now, therefore, in accordance with said findings of fact and conclusions of law, it is ordered, adjudged and decreed that the plaintiff Oregon Short Line Railroad Company, a corporation, is the owner and is entitled to the exclusive possession of the premises described in the complaint, to-wit:

Commencing at station 522 plus 99 on the center line of the Boise Branch of the Oregon Short Line Railroad Company, said station being 1096 feet east of the intersection of said center line with the Boise Meridian, measured along said center line; thence 100 feet due north to place of beginning; thence due north 410 feet; thence easterly parallel to said center line 1304.2 feet; thence due south 410 feet; thence westerly parallel to said center line 1304.2 feet to place of beginning, of which the premises described in the answer,

to-wit, lots 5, 6, 7 and 8 in block 4 in Rowan's Addition to the town of Meridian are a part, all of which premises are situate in Ada County, Idaho, and form a part of the east half of the southwest quarter of Section 7, Township 3 north, Range 1 east of Boise Meridian; and that no one of the defendants has any right, title, interest or estate in or to any part or portion of said premises,
16 and the defendants and each of them are perpetually enjoined from interfering with the plaintiff's exclusive possession of said premises, and the whole thereof, and from claiming any right, title, estate or interest in or to any portion of said premises.

And it is further adjudged that the plaintiff recover from the defendants its cost herein incurred, amounting to $——.

Dated this 23rd day of July, 1906.

GEORGE H. STEWART, *Judge.*

Statement on Motion for New Trial.

This cause came on for trial on the 2d day of July, 1906, the same being tried by the Court without a jury, Messrs. Wyman & Wyman, and F. S. Dietrich, appearing for the plaintiff, and the said defendants, A. R. Stalker and Emaline Stalker, by Hugh E. McElroy and Frank Martin, their attorneys, the other defendants making default herein, the said trial being had upon the issues made by the complaint and the answer of said defendants A. R. Stalker and Emaline Stalker;

Whereupon the said plaintiff offered in evidence the certain stipulations, to-wit:

A certain stipulation, signed by the counsel for the respective parties as follows:

Stipulation of Facts.

For the purpose of avoiding expense it is hereby stipulated
17 and agreed by the plaintiff herein, and the defendants, A. R. Stalker and Emaline Stalker (the other defendants being in default) that in addition to the facts admitted by the pleadings, the following are the facts herein involved, to-wit:

I.

The plaintiff is the successor in interest of the Idaho Central Railway Company, a corporation, organized under the laws of Wyoming, and is the owner of all the rights and title in and to the tract of land 1304.2 feet long and 410 feet wide particularly described in paragraph II, of the complaint, acquired by said Idaho Central Railway Company, a corporation, by reason of the acts and facts hereinafter particularly stated, and appearing in any further proofs which may be offered.

II.

That said "The Idaho Central Railway Company" at all the times herein mentioned was a railroad corporation duly organized under the laws of the Territory (now State) of Wyoming. That on July 1, 1887, said Railway Company filed with the Honorable Secretary of the Interior a duly certified copy of its articles of incorporation and due proofs of its organization under the same, as required by law and in full compliance with the rules and regulations of the Honorable Secretary of the Interior.

18

III.

That said Railway Company was organized for the purpose of operating and constructing a line of railroad from Boise City, Idaho, to Nampa, Idaho, the same being the line of railroad between Boise and Nampa now owned and operated by the plaintiff, and connecting with the railroad of the Oregon Short Line Railroad Company at Nampa.

IV.

That at all times prior to October 18, 1888, the east half of the southwest quarter and the west half of the southeast quarter of Section seven (7), Township three (3) north, Range one (1) east of Boise Meridian was (with the exception of such rights, if any, as said Idaho Central Railway Company had acquired therein by compliance with the provisions of the act of Congress approved March 3, 1875, entitled "An Act granting to railroads the right of way through the public lands of the United States"), unoccupied and unclaimed public land of the United States. That upon said October 18, 1888, one Joseph G. Reed, being duly qualified so to do, filed upon said tract of land, in the Land Office, Boise City, preemption entry No. 4011, claiming residence established the same day. That thereafter, to-wit, on April 24, 1889, said Reed made final proof upon said tract of land, and patent issued to him therefor August 4, 1891. That said lands and the other lands in said township were surveyed and

19 opened to entry upon the 1st day of July, 1875.

V.

That upon June 10th, 1887, the Board of Directors of said Idaho Central Railway Company adopted a route for its said railroad from Nampa to Boise City, said route being the same as that now occupied by said railroad track, the center line of said railroad track corresponding to the center line of said route, and said track always having been in the same place, that is, the identical place now occupied by the same. That said route passed and passes over and through said tract of land so entered by said Reed.

VI.

That thereafter said Idaho Central Railroad Company caused to be made and filed in duplicate with the Register of the United States

Land Office at Boise City, Idaho, the same being the Land Office of the District in which said land was and is situated, a profile or map of alignment of its said road in due form, the center line of which corresponds to the center line of said railroad as the same was thereafter constructed, and has ever since been maintained and now exists over and across said tract of land. That said profile map was upon February 17th, 1888, duly approved by the Honorable Secretary of the Interior, and sent back to the said Land Office at Boise.

20

VII.

That said railroad from Nampa to Boise was constructed along and upon said route prior to, and was in operation upon, September 1, 1888.

VIII.

That upon September 12, 1888, said Idaho Central Railway Company caused to be filed, in duplicate, with the Register of said Land Office at Boise City a profile map showing said tract of land as described in the complaint and hereinbefore described, and claiming the same as station grounds for station buildings, turnouts, sidetracks, depot, and water station. That said profile map of said station grounds was by the said Register transmitted to the Honorable Secretary of the Interior, and filed in his office September 20, 1888, and by him approved December 15, 1888, and then returned to the said Register of said Land Office.

IX.

That said Joseph G. Reed, by warranty deed conveyed to W. H. Rowan, the land embraced in his said pre-emption entry, and for which patent issued to him August 4, 1891, as hereinbefore stated. That thereafter said Rowan executed and filed a plat with the County Recorder of Ada County, Idaho, covering a portion of said land embraced in said pre-emption entry, and a portion of said tract claimed by the plaintiff as its station grounds, said plat being

21

designated as Rowan's addition to the town of Meridian, and thereupon said Rowan conveyed to said defendants, A. R. Stalker and Emaline Stalker, lots 5, 6, 7 and 8, in block 4, of said Rowan's addition, all of which said lots are embraced within said tract claimed by plaintiff as its station grounds.

This stipulation shall not preclude plaintiff or defendant from offering competent evidence not inconsistent herewith.
Dated October 19th, 1905.

Whereupon, plaintiff offered in evidence the following stipulation, signed by the attorneys for the respective parties, to-wit:

In addition to the facts agreed upon in the written stipulation heretofore made, it is further agreed that the attached blue print is a correct copy of the original map or plat of the station grounds claimed by plaintiff, filed with the Secretary of the Interior, the same being

the map or plat referred to in the stipulation of facts heretofore made, all of the certificates and endorsements thereon being also found upon the original.

It is further agreed that the attached copy of the minutes of a meeting of the Board of Directors of the said Idaho Central Railway Company is a correct copy of the minutes of a meeting of the Board of Directors of said Idaho Central Railway Company, held August 6, 1888, as said minutes appear in the minute book of the said Company. And the said minutes refer to and authorize the execu-
22 tion and filing by the officers of the said Idaho Central Railway Company, of the original map or plat of which the attached blue print is a copy.

It is further agreed that the Register and Receiver of the said United States Land Office at Boise, Idaho, upon the return of the said profile or plat of the said depot grounds, after the same had been approved by the Secretary of the Interior, failed and neglected to note the same upon the plats in the said Land Office, and that the same has never been noted upon the said plats to this date; and that at all times since the commencement of this action said profile or plat has been missing from the United States Land Office and cannot be found.

The minutes above referred to are as follows:

A special meeting of the trustees of the Idaho Central Railway Company, was called to meet on this 6th day of August, 1888, for the purpose stated in said request, written notice of said meeting was on the 27th day of July, 1888, mailed to each member of the said Board of Trustees, said written notice containing a full statement of each of the said purposes as stated in the said request for said meeting.

And be it remembered that on the 6th day of August, 1888, at Cheyenne, Wyoming, at the law office of Corlett, Lacy & Ruier, the same being the office of this Company, at said City of Cheyenne, at the hour of 10 o'clock in the forenoon of said day, the trustees of said Idaho Central Railway Company, met pursuant to said call, the following trustees being present, to wit: James M.
23 Stewart, James A. McGee, Edward Dickinson, Robert Blickensderfer and John H. Hickey.

The meeting was called to order by Edward Dickinson, President of this Company and ex-officio President of the Board of Trustees, the call for this meeting was thereupon read by the Secretary, and on motion duly seconded it was resolved: That the President of this Company be instructed to authorize and ratify the survey of certain tracts of land in Section 22, Tp. 2 N. of R. 2 W. and in Section 7, Tp. 3 N. of R. 1 E., all in Ada County, Idaho Territory, for station buildings, depots, machine shops, side tracts, turnouts and water stations, each tract to consist of twenty acres.

On motion duly seconded it was resolved: That the board of trustees authorize the President of this Company to present the plats of such survey for the approval of the Secretary of the Interior, in order that the Company may obtain the use of the grounds under

the act of Congress of March 3, 1875, for the purpose above set forth.

On motion duly seconded it was thereupon resolved: That the President and Secretary of this Company be authorized to reconvey to John T. Wilburn such of the land conveyed by him by deed of August 6, 1887, as is not covered by the located right of way of this Company and to receive in exchange therefor deeds for the lands covered by the located right of way.

On motion duly seconded it was further resolved: That the President of this Company be authorized to procure a survey of
24 the most feasible route for the railway of this Company from some point on the Idaho Central Railway west of the ranch of William R. Ridenbaugh into Boise City in the Territory of Idaho.

On motion duly seconded it — further resolved: That the arrangements by the officers of this Company with the trustees of the first mortgage indenture bonds of the Idaho Central Railway Company to take three bonds at 110 in lieu of one per cent. of the aggregate of the principal money mentioned in the certified bonds secured by said mortgage, be and the same is hereby ratified and in all things confirmed and approved.

On motion duly seconded the meeting thereupon adjourned.

E. D. DICKINSON.

JAMES A. McGEE, *Secretary.*

The map in said stipulation referred is hereto attached and made a part hereof.

Whereupon the plaintiff rested.

Defendants then offered the following evidence, to-wit:

A. R. STALKER, being first duly sworn, testified as follows:

I am one of the defendants in this case. I first became acquainted with the land in controversy in this case seven years ago this spring. Since that time I have resided within two miles and a quarter of Meridian. So far as I know during that time the plaintiff has not occupied said land for railroad purposes or used the same
25 for any purposes whatever. At the time I purchased these lots I had no knowledge that the property was claimed by the plaintiff.

(Foregoing evidence objected to by plaintiff as immaterial and objection overruled and exception noted.)

Plaintiff admits that defendant, Emaline Stalker, had no other knowledge of these matters than her husband, A. R. Stalker.

Cross-examination:

"At the time I purchased the land in controversy plaintiff was maintaining one side track and a depot building and a small building upon its right of way adjacent to this tract of land claimed by it as station grounds. This tract of land claimed by the plaintiff as its station grounds is situated in what is called the town of Meridian. Meridian has about seven hundred or eight hundred inhabit-

ants I should think. When I purchased there were no buildings upon this tract of land. There was a street on the north side and also on the west side of the tract."

Specifications of Error.

Defendants specify the following particulars in which the evidence is insufficient to justify the decision and findings of the court:

1. That finding No. 2 is wholly unsupported by the evidence in the following particulars:

(*a*) The evidence does not show that the plaintiff is the owner or is entitled to the exclusive possession of the property de-
26 scribed, but on the contrary, the stipulations filed herein show that these defendants hold title in fee simple to said premises, under patent from the United States, issued to their predecessor in interest, Joseph G. Reed, subject, however, to the easement, if any, acquired by plaintiff for the use of said premises for railway purposes only, by compliance with the provisions of an act of Congress approved March 3, 1875 entitled "An Act granting to railroads the right of way through public lands of the United States."

(*b*) That the stipulations and evidence herein show that plaintiff failed to comply with the requirements of the law above referred to, and that the premises herein described were never segregated from the public domain as required by said law, and that the Register and Receiver of the United States Land Office at Boise, Idaho, having jurisdiction of said land, failed and neglected to note the profile or plat of the grounds claimed by plaintiff upon the plats of said Land Office as required by law, and patent for said lands issued to the predecessor in interest of defendants without the same being segregated from the public domain and thereby said predecessor in interest and his grantees, these defendants took title and interest to said premises free and clear of any claim of the plaintiff.

2. That finding No. 3 is unsupported by the evidence, it being admitted by the evidence in this case that the only interest claimed by plaintiff is that of an easement for none other than rail-
27 way purposes, and that the title in fee simple rests in these defendants, and that the same was acquired without knowledge of any claim of plaintiff to said premises, and that plaintiff failed to comply with the law granting such easement and failed to secure the segregation of said premises from the public domain.

3. That finding No. 5 is unsupported by the evidence, it being admitted by the stipulations of plaintiff that said premises were conveyed by the United States to Joseph G. Reed, without any segregation of said premises or of the easement therein claimed by plaintiff, free and clear of claim of plaintiff, and that defendants have acquired by regular conveyance the title of said Reed.

Errors of Law.

1. The Court erred in not finding specifically the facts in relation to the title claimed by plaintiff and finding either for or against the claim of plaintiff to an easement in these premises for railway purposes only and not a claim to title in fee simple.

2. Assuming that the Court intended to find for plaintiff as to the title of the plaintiff to an easement in said premises for railway purposes the Court erred in directing judgment other than for the protection and establishment of said easement.

3. That the Court should have found as a conclusion of law that defendants were the absolute owners of the premises in controversy.

28 Defendants propose the foregoing as their statement of the case on motion for a new trial and pray that the same may be settled and allowed.

(Signed) H. E. McELROY,
(Signed) FRANK MARTIN,
Attorneys for Defendants, Residing at Boise, Idaho.

Received of Hugh E. McElroy and Frank Martin, for amendment, a copy of the foregoing draft of statement of the case this 25th day of July, 1906.

(Signed) WYMAN & WYMAN,
Attorneys for Plaintiff.

Order Settling Statement.

I hereby certify that the foregoing statement of the case is a true and correct statement and contains all the evidence introduced by the parties at said trial, reduced to narrative form and that the same is hereby settled and allowed.

Done this 17th day of September, 1906.

(Signed) GEORGE H. STEWART, *Judge.*

O. K.
(Signed) WYMAN & WYMAN.

(Title of Court and Cause.)

Order Denying New Trial.

Now on this 31st day of October, 1906, the motion of defendants, A. R. Stalker and Emaline Stalker, for a new trial herein
29 duly came on for hearing, upon the statement of the case heretofore settled, allowed and filed, Messrs. Wyman & Wyman and F. S. Dietrich appearing for plaintiff and Frank Martin and Hugh E. McElroy, Esqs., appearing for defendants, A. R. Stalker and Emaline Stalker, and the Court having duly considered

said motion ordered that the same be and is hereby denied, to which ruling counsel for defendants except.

GEORGE H. STEWART, *Judge.*

Filed October 31, 1906. W. L. Cuddy, Clerk.

(Title of Court and Cause.)

Notice of Appeal.

To the said plaintiff, the clerk of said Court and Messrs. Wyman & Wyman, P. L. Williams and F. S. Dietrich, attorneys for plaintiff:

Take notice that defendants, A. R. Stalker and Emaline Stalker, hereby appeal to the Supreme Court of the State of Idaho from the judgment entered in the above entitled cause in the above Court in favor of the plaintiff and against these defendants on the 23rd day of July, 1906, and from the whole thereof;

Also, that said defendants hereby appeal to said Supreme Court from the order of the above Court, made and entered October 31, 1906, overruling the motion of defendants for a new trial in said cause.

Dated this 3d day of December, 1906.

HUGH E. McELROY AND
FRANK MARTIN,
Attorneys for Defendants, A. R. and Emaline Stalker, Appellants Herein.

Service of said notice by copy acknowledged this 3d day of December, 1906.

WYMAN & WYMAN,
Attorneys for Plaintiff.

Endorsed: Filed December 3, 1906.

Certificate to Transcript.

It is hereby stipulated by the attorneys for plaintiff and defendants, A. R. Stalker and Emaline Stalker, parties to the above cause, that the foregoing transcript contains a true, full and correct copy of the judgment roll in said action together with the statement on motion for new trial, except the map, the order denying motion for new trial and the notice of appeal. We further certify that an undertaking on appeal from the judgment in said cause and from the order denying said motion for new trial, in due form, was properly filed in this cause on December 5th, 1906.

Dated 24th day of Dec., 1906.

HUGH E. McELROY AND
FRANK MARTIN,
Attorneys for Appellants.
P. L. WILLIAMS,
F. S. DIETRICH,
WYMAN & WYMAN,
Attorneys for Respondent.

Copy received this 10th day of January, 1907.

WYMAN & WYMAN,
Attorneys for Respondent.

31 The following entries appear of record under the dates named:

No. 1270.

OREGON SHORT LINE RAILROAD CO., Respondent,
vs.
A. R. STALKER and EMALINE STALKER, Appellants.

BOISE, IDAHO, *April* 15, 1907.

This cause having been heretofore set for hearing, now on this day the same was called, Hugh E. McElroy appearing as counsel for appellants, and D. Worth Clark being entered and appearing as counsel for respondents. After argument the cause was submitted and by the court taken under advisement.

BOISE, IDAHO, *May* 15, 1907.

This cause having been heretofore heard, submitted and taken under advisement by the court, and the court having fully considered the same, now on this day the cause was again called, and the decision of the court is delivered by Chief Justice Ailshie, to the effect that the judgment of the lower court be reversed.

It is therefore considered, adjudged and decreed by the court that the judgment of the District Court of the Third Judicial District in and for the county of Ada in the above entitled cause be and the same hereby is reversed. Costs are awarded to appellants.

BOISE, IDAHO, *June* 14, 1907.

A petition for a rehearing having been heretofore filed by respondents in this cause, it is now ordered that a rehearing therein be granted.

32 BOISE, IDAHO, *January* 3, 1908.

Ordered that this cause be set for hearing on January 14th, 1908.

BOISE, IDAHO, *January* 14, 1908.

This cause having been heretofore set for hearing, now on this day the same was called, H. E. McElroy and Frank Martin appearing for appellants and D. Worth Clark appearing for respondent. After argument the cause was submitted and by the court taken under advisement.

BOISE, IDAHO, *February* 27, 1908.

This cause having been heretofore reheard and again submitted and taken under advisement by the court, and the court having fully considered the same, now on this day the cause was again

called, and the decision of the court is delivered by Justice Sullivan to the effect that the judgment of the lower court be affirmed.

It is therefore considered, adjudged and decreed by the court, that the judgment of the District Court of the Third Judicial District in and for the county of Ada in the above entitled cause be and the same hereby is affirmed. Costs awarded to the respondent.

33 Filed May 15, 1907. I. W. Hart, Clerk.

In the Supreme Court of the State of Idaho, February Term, 1907.

OREGON SHORT LINE RAILROAD COMPANY, Respondent,
v.
A. R. STALKER et al., Appellants.

Railroad Grant—Right to Station and Depot Site—Forfeiture and Abandonment of Right.

1. Where a railway company filed a profile map of its right of way and depot and station grounds and had the same approved by the Secretary of the Interior, but failed and neglected to have the selection noted on the plats in the local land office, and the map so furnished was lost or destroyed, and no notation of the selection was ever made on the plats of the local land office, and the company failed and neglected for more than seventeen years to take possession of the grounds claimed for depot and station site, and exercised no acts of ownership or right of possession over the premises, and eight days after the filing of such profile map a preemptor settled and filed upon the legal subdivisions comprising and including the station and depot grounds claimed by the company, and thereafter made final proof upon and received patent for the entire legal subdivision, and had no notice, either actual or constructive, that the railway company claimed any station and depot grounds within the limits of his preemption claim, and received no such notice or information until long after the receipt of his patent for the land; Held, that the railway company under such facts and circumstances will be deemed to have forfeited and abandoned its right to claim depot and station grounds under the act of Congress of March
34 3d, 1875, and that it will not be allowed to maintain an action of ejectment against the grantees and successors in interest of the patentee of such lands.

2. Where injury must result to one of two parties on account of the failure to discharge an act, the duty of doing which is imposed upon a third party, the consequent loss must fall upon that party in whose interest the act should have been performed, and on whom the duty devolved to see that such act was in fact performed.

(Syllabus by the Court.)

Appeal from the District Court of the Third Judicial District in and for the County of Ada.

Hon. George H. Stewart, Judge.

Action in Ejectment by the Plaintiff to Recover Possession of Certain Lots and Ground Claimed as Depot and Station Site.

Judgment for plaintiff and defendants appealed. Judgment reversed.

Hugh E. McElroy and Frank Martin for appellants.

P. L. Williams, F. S. Dietrich, Wyman & Wyman and D. Worth Clark for respondent.

AILSHIE, *C. J.*:

This is an action in ejectment instituted by the plaintiff, the Oregon Short Line Railroad Company, to recover possession of four lots in Rowan's addition to the town of Meridian in Ada County. The Railroad Company claims this ground under the provisions of the act of Congress of March 3, 1875 (18 U. S. Stat. at Large, 482), granting rights of way and depot and station grounds to railway corporations that comply with and bring themselves under the provisions of that act. The defendants answered denying the allegations of the complaint and alleging a fee simple title to the lots in question through patent issued by the United States to their
35 grantor. The case was determined on an agreed statement of facts, and it must be conceded that these facts are very meager and in some respects indefinite. Judgment was entered in favor of the plaintiff in the lower court and the defendants moved for a new trial and the motion was denied and they appealed from the judgment and order. The facts that can be gathered from the stipulation are substantially as follows: That on July 1st, 1887, the Idaho Central Railway Company, the plaintiff's grantor and predecessor in interest, filed with the Secretary of the Interior a certified copy of its articles of incorporation, and duly and regularly qualified to take and hold rights of way under the act of Congress of March 3, 1875. Thereafter and on September 12, 1888, the plaintiff filed with the Register of the United States Land Office at Boise, a profile map showing the definite location of its track and line of road from Nampa to Boise, and also its proposed station grounds, turnouts, tracks and depots. Its profile map was filed in duplicate and was transmitted by the Register to the Secretary of the Interior, and was by the Secretary approved on December 15, 1888, and thereafter returned to the Register of the Boise Land Office. It also appears that the Register and Receiver of the Land Office at Boise failed and neglected to note the depot and station grounds, sidetracks and turnouts on the plats in the land office "and that the same has never been noted upon the said plats to this date and that at all times since the commencement of this action said profile or plat has

been missing from the United States Land Office and cannot be found." On October 18, 1888, one Joseph G. Reed filed upon 160 acres of public land which included and embraces the land in dispute in this case, and he thereafter and on April 24, 1889, made final proof and patent issued to him on August 4, 1891.

36 Reed thereafter by warranty deed conveyed the land to one W. H. Rowan, who platted the land now claimed by the railway company as depot and station grounds, and filed the plat thereof with the County Recorder as an addition to the town of Meridian. Rowan thereafter conveyed to the defendants Stalker the four lots now in question. It appears that the railway company has never occupied or used any of the ground that it now claims for depot and station purposes. On the other hand, the only specific evidence we have of the entryman or his grantees exercising any particular acts of dominion or ownership or right of possession over this ground, is that of Rowan's platting the ground as an addition to the town of Meridian. This, however, is very clear evidence that Rowan at that time claimed the ground as his own and did not recognize it as belonging to the railway company or the railway company having any right thereto. We are not advised, however, as to when this ground was platted for town-site purposes. It is stipulated that the road from Nampa to Boise was constructed and in operation prior to September 1, 1888. This fact is abundantly sufficient under a long line of authorities to give the entrymen who thereafter filed upon the land notice of the definite location of the line of road so as to withdraw the right of way from entry and purchase. See cases cited and reviewed in O. S. L. R. R. Co. v. Quigley, 10 Idaho, 770. The evidence, on the other hand, does not show that the company had established a station at Meridian at that time. On the contrary, it is admitted that it had not taken possession of any ground outside of its right of way and was not apparently occupying or claiming any station or depot grounds or exercising any right of possession over any ground that it claimed or intended to claim outside of or beyond that granted for right of way.

37 The appellants claim that in order for the railway company to withdraw the twenty acres allowed it for station purposes, it was necessary, as a condition precedent, that it file its map and plat thereof and have the same approved by the Secretary of the Interior and also have the Register and Receiver note the selection and reservation on the plats in the local land office in order to give notice of the claim to an entryman who might file upon and receive patent for the legal subdivision in which such station grounds are located. Sec. 4 of the act of March 3, 1875, is as follows: "That any railroad company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior, the same shall be noted upon the plats in said office; and thereafter

all such lands over which such right of way shall pass shall be disposed of subject to such right of way; Provided, That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road." It will be noted that to literally follow the provisions of this statute there is no method pointed out for the company to acquire the right to the use of station grounds except by actually entering upon, appropriating and using the land for such purposes. The statute does not in so many words say that the company shall make and file a profile of its station grounds, but rather of its right of way. Still the Department of the Interior seems to have required profiles of rights of way
38 to include station grounds the same as the right of way, and has considered the right of appropriation and use vested in the same manner. (In re St. Paul, Minneapolis and Manitoba Ry. Co., 26 L. D. 181; In re Hamilton Pope, 28 L. D. 402.) The purpose of filing such plats and maps and their approval by the department has been to give notice both to the government and the prospective settler and purchaser of the lands as to the location of the road and the grounds claimed for such purposes. Where, however, the road is actually under construction, or has been constructed prior to the selection by the settler, it has been uniformly held that the construction of the road upon the ground furnished actual notice and supplied the place of constructive notice given by the filing of plats. Now, if the reasoning of these cases is followed a step further, we would conclude that in the case of depot grounds the plat in the local land office must either show the grounds claimed by the company, or in the absence of such a constructive notice, then the company must be in possession of the grounds claimed for such purposes in order to furnish the settler with actual notice. It seems to be the purpose and intent of the government to give either actual or constructive notice to settlers and purchasers of the public lands over which rights of way are claimed and on which depot grounds are selected. The act of March 3, 1875, seems to require that the purchaser of lands over which a right of way is claimed or on which depot grounds are selected, shall pay for the entire legal subdivision, and that he takes the title to the whole thereof "subject to such right of way," says the statute. The rules of the Interior Department also require that the settler shall pay for the whole subdivision and his patent is accordingly issued therefor. It seems to be a conceded fact in this case that the profile map or plat filed by the company with the Secretary of the Interior showed these grounds as
39 claimed by the company for depot purposes, and the whole trouble revolves about the fact that this selection was never noted on the plats in the local land office, and that plat was lost or misplaced and was never supplied.

Counsel for respondent contend that this was a mere clerical duty required to be performed by the Register and Receiver of the land office and that their failure to do so was no fault of the railway company. Counsel for appellant, however, contend that since the only acts required to be performed by the company in order to reserve this

land was the filing of the plat or map and having it approved and the selection noted on the plats in the local land office, it was the duty of the company to see to it that all these acts were performed and that the failure to do so was more the fault of the company than it was of the settler or purchaser of these lands, and that the loss should therefore fall upon the one most culpable and blamable therefor. It appears to us that since the railway company had not taken actual possession of the grounds claimed for depot and station site, and have never done so, and have never exercised any acts of control or ownership or evidenced any claim of the right of possession, and have never seen to it that the selection was properly noted on the plat, the loss should more justly and properly fall upon it than upon the settler and purchaser. Defendant testifies that he never had any notice or information that the company claimed any more ground than was embraced in its right of way and it does not appear that his grantor or the original settler and patentee ever had any notice or knowledge of such claim on the part of the railway company. If this claim can be maintained against the defendant there is not a doubt but that a like claim could be maintained against any other settler along the line of respondent's road between
40 Boise and Nampa. It is easy to understand how a settler would take a forty or eighty acre tract with a railroad right of way running across it, but it would be very different with one taking a forty or eighty acre tract, or even a hundred and sixty, where he had not only to give a 200 foot right of way, but twenty acres additional for depot grounds. And again, where he has neither actual nor constructive notice of the claim nor of its definite location within the bounds of his preemption he has absolutely no protection. Here the matter ran for over seventeen years before the company asserted any right or claim to this ground. During such time as it maintained a station at Meridian all its buildings and side tracks were on its right of way. It seems to us that whatever right the railway company may have initiated by filing its profile map with the Secretary and procuring his approval therof, it forfeited and lost the same through failure to perfect and mature the claim by either completing the constructive notice in having the selection noted on the land office plats or in the absence of that by taking possession of the grounds claimed.

The statute, after enumerating the acts to be performed, namely; filing the profile map, and its approval by the Secretary and the notation on the plats of the local office, provides that "thereafter,"—subsequently, afterward, after that,—all such lands over which rights of way pass "shall be disposed of subject to such right of way." This of course has reference only to the purely constructive notice where the road has not been built and no possession has been taken. The "thereafter" used in this statute must refer as much to the notation on the plats of the local land office as to the filing of the plat itself, but when once done would probably relate back to the date of the first act,—that is to the filing of the plat;
41 provided the land had not in the meanwhile been "disposed of."

The judgment in this case should be reversed and a new trial granted, and it is so ordered, and the cause is remanded. Costs of appeal awarded in favor of appellants.

Sullivan, J., concurs.

42 In the Supreme Court of the State of Idaho, November Term, 1906.

No. —.

OREGON SHORT LINE RAILROAD CO., Respondent,
vs.
A. R. STALKER and EMALINE STALKER, Appellants.

Petition for Rehearing.

On Appeal from the District Court of the Third Judicial District of the State of Idaho in and for Ada County.

Hugh E. McElroy and Frank Martin, Attorneys for Appellants.
P. L. Williams and D. Worth Clark, Attorneys for Respondent.

Filed —— —, 1907. —— ——, Clerk.

43 To the Honorable Supreme Court of Idaho:

In view of the importance and far reaching effect of the decision rendered in this cause, and believing, after a careful reading of the opinion filed, that the same was rendered under a misapprehension of the facts as shown by the record, and under a misapprehension of the law as applied to those facts, we respectfully petition the court to grant a re-hearing in this cause.

Nature of the Cause of Action.

It is said in the opinion that "This is an action in ejectment, instituted by the plaintiff, the Oregon Short Line Railroad Company, to recover possession of four lots in Rowan's addition to the Town of Meridian, in Ada County." We would respectfully suggest to the court that this action is not in any sense an action in ejectment. This action is merely the ordinary action to quiet title, brought under the statutes of the State of Idaho. No possession is alleged in the defendant, and this action is brought to determine any adverse claims of the defendant. It is primarily then an action to quiet title and not an action of ejectment. We call this manifest error to the attention of the court for the purpose of enabling the court to correct its decision in this regard, if it desires to do so.

The Statement of Facts.

It is said in the opinion "That the agreed statement of facts
44 in this case is very meager and in some respects indefinite." As we understand this action there was but one question de-

cided by this court, and that was: Did Reed, the patentee, take legal subdivisions covered by his patent, subject to or exclusive of the railroad company's right of way and station grounds? It being admitted in the argument that this question depended upon one fact, that fact being, whether or not it was necessary for the railroad company to see to it that the local land officers at Boise made the necessary notation upon the plats in the land office. The stipulated facts in this case very clearly show that the maps of these station grounds were filed in the local land office at Boise prior to the date of the homestead entry of Reed, and that these maps were subsequently approved by the Secretary of the Interior and returned to the local land office at Boise, and were subsequently lost, without any notation being made upon the plats, and that the plaintiff did all that it was required to do in every way, and was not negligent in any particular, unless it was its duty to attempt to compel the officers of the local land office to do their duty and make this notation upon the plats. Upon the point decided by the court it seems to us that the stipulated facts show everything necessary for a decision.

Effect of Possession of Land.

Again it is said in the opinion of the court,

"That it appears that the railroad company has never occupied or used any of the ground that it now claims for depot and station grounds. On the other hand the only specific evidence we have of the entryman or his grantees exercising any particular acts of dominion or ownership or right of possession over this ground is that of Rowan's platting the ground as an addition to the Town of Meridian. This, however, is very clear evidence that Rowan at that time claimed the ground as his own and did not recognize it as belonging to the railroad company."

45 We fail to understand what rights, if any, Rowan could acquire in this land by platting it. Certainly that would not give him any title and would not be evidence of any title, nor would it be evidence of title such as Rowan could found a claim of adverse possession upon, and it does not seem to us that in arriving at a decision in this case the fact that Rowan platted this land should in any manner or to any extent influence the decision of the court. On the other hand, the railroad company having filed its map and the same having been approved, the railroad company had the legal title and therefore the legal possession.

Respondent Cannot Lose Rights by Neglect of Officials.

Again it is said in the decision:

"It was the duty of the company to see to it that all those acts were performed and that the failure to do so was more the fault of the company than it was of the settler or purchaser of these lands, and that the loss should therefore fall upon the one most culpable and blamable therefor."

We do not understand that it was the fault of either the company

or the settler that this notation was not made upon these plats. The land officers at Boise failed to do their plain duty under the statute. And we do not believe that either the company or the settler were at fault in that matter because neither had any power to compel a performance of this duty. Neither do we understand that either the railroad company or the settler were in any way culpable or blamable on account of such failure of duty upon the part of the land officers. The company did all that they were required to do under the statute. It was not within their power to compel the land officers to make this notation upon the plats. It was not within their power to preserve the maps, and in this particular case the maps finally were lost; and following the line of reasoning adopted by the court
46 we might say that the company was more culpable and blamable on account of the loss of these maps than was the settler, because the inference would be, from the reasoning of the court, that it was the duty of the company to guard these maps and see to it that they should remain safely deposited in the office of the Register and Receiver at Boise. We do not so understand the law, and in that regard call the attention of the court to the case of Van Wyck vs. Knevals, 106 U. S., 360 (27 L. Ed. 201). In that case the following language was used:

"The inquiry then arises, when is the route of the road to be considered as definitely fixed so that the grant attaches to the adjoining sections? The complainant in the court below, who derives his title from the company, contends that the route is definitely fixed within the meaning of the act of Congress when the company files with the Secretary of the Interior a map of its lines, approved by its directors, designating the route of the proposed road. On the other the defendant, the appellant here, who acquired his interest by a subsequent settlement on the lands and a patent therefor, contends that the route cannot be definitely fixed so that the grant attaches to any particular sections and cuts off the right of settlement thereon until the lands are withdrawn from market by order of the Secretary of the Interior and notice of the order of withdrawal is communicated to the land officers in the district in which the lands are situated. We are of the opinion that the position of the complainant is the correct one. The route must be considered as definitely fixed when it has ceased to be the subject of change at the volition of the company. Until the map is filed with the Secretary of the Interior the company is at liberty to adopt such a route as it may deem best, after an examination of the ground has disclosed the feasibility and advantages of different lines, but when a route is adopted by the company and a map designating it is filed with the Secretary of the Interior, and accepted by that officer the route is established. It is, in the language of the act, "definitely fixed," and cannot be the subject of future change, so as to affect the grant, except upon legislative consent. No further action is required of the company to establish the route. It then becomes the duty of the Secretary to withdraw the land granted from the market; but if he should neglect his duty the neglect would not impair the rights of the company, however prejudicial it might be to others."

This is the decision of the court of final resort in this class of cases, and it seems to us fairly and squarely decides that the neglect of an officer cannot operate to defeat the grant.

In the case of Lytle et al., vs. The State of Arkansas et al., 9 How. U. S., 314 (13 L. Ed., 153), the court lays down the general
47 rule governing this question in the following language:

"It is a well established principle that where an individual in the prosecution of a right does everything which the law requires him to do and he fails to attain his right by the misconduct or neglect of a public officer the law will protect him."

In the case of Goist vs. Bottum, 5 L. D., 643, the Secretary of the Interior, in discussing a kindred question, uses the following language:

"Both parties throughout seem to have acted in entire good faith and done that which the law required in order to secure title to the desired land. The whole difficulty has arisen from the failure of the local officers to keep their records properly posted. Matters being thus in equi librio a most careful scrutiny of the whole case is imperatively demanded."

And again, on page 646, in the same decision, the court uses the following language:

"It follows naturally from this premise that the failure of the local officers to have noted upon the proper records of their office his claim against said tract cannot be permitted to work to his prejudice, inasmuch as he had done all the law required of him and the officers alone were derelict in this duty."

In the case of Linville vs. Clearwaters et al., 11 L. D., 356, the court uses the following language:

"The entry of Clearwaters having been allowed segregated the land, even though it may not have been entered of record, and the failure to place it of record would not affect his rights."

There are a great many other decisions found reported in decisions of the Department of the Interior to the same effect, and, as before shown, these decisions of the Department of the Interior are in accordance with the Decision of the Supreme Court of the United States, the court of last resort in this class of cases.

In the case at bar it cannot be contended that the plaintiff failed to do anything that it was required to do under the statutes. Therefore the only question is, whether or not the plaintiff can be held liable for the neglect of the local officers in failing to make
48 the proper notation upon the plat. That being true, it seems to us that this question falls squarely within the decisions cited above, and that these decisions are controlling.

Similar to the rules of law laid down in the above authorities is the rule of law as to the destruction of a record. This rule, as laid down in the second edition of the American and English Encyclopedia of Law, is as follows:

"A grantee in an instrument evidencing a conveyance to him who has complied with the requirements of the law in effecting the record of the instrument cannot lose the effect given to such recordation by a subsequent destruction of the record, as by fire or other

cause, and in the absence of any statutory requirement he is not obliged to record the instrument a second time or to do any other act to notify purchasers in order to protect his rights acquired thereunder."

24 Am. Eng. Enc. of Law, p. 153 (2nd edition).

The weight of authority also seems to be that when a grantee has duly deposited for record a valid instrument, at the proper time, in the proper office, and with the proper officer, he has performed his whole duty, and subsequent purchasers will be charged with constructive notice notwithstanding the officer does not properly spread the instrument on the record book or fails to record it at all.

Polk vs. Cosgrove, 4 Biss. U. S., 437.
Hudson vs. Randolph, 66 Fed. Rep., 216.
Seibold vs. Rogers, 110 Ala, 438.
Buckner vs. Davis, 43 S. W., 445 (Ky.).
Deming vs. Miles, 35 Neb., 739; 37 Am. St. Rep., 464.
Schell vs. Stein, 18 Am. Rep., 416 (Pa.).
Nichols vs. Reynolds, 36 Am. Dec., 238 (R. I.).
Throckmorton vs. Price, 91 Am. Dec., 334.

The only object of the recording statutes is to give notice, and the statutes all provide that it is the duty of the person desiring to give notice to have his instrument recorded. How much stronger then are the decisions in regard to the failure of an officer to record an instrument than it would be necessary to go in the case at
49 bar. In this case the object of the statute is not so much a question of notice to the public as it is the fixing of a floating grant. As soon as the grantee selects land subject to the grant and in the mode prescribed by the Department advises the Department of such selection the grantee has done all the law requires and the grant has fixity not only of the grantee but of the thing granted. Besides that, it is not the duty of the railroad company to deliver these maps to the local land office so that the proper notations may be made upon the plats, but that is done by the Secretary of the Interior. It is only the railroad company's duty to deliver the plats to and file them with the local land officers. They are then forwarded by the local land officers to the Secretary of the Interior, who either approves or rejects them, and if he approves the Secretary then returns the maps to the local land officers for notation upon the plats. It will thus be seen how much stronger the decisions affecting the recording of instruments are in our favor, and how much further they go than it is necessary to go in this case. Of course we do not contend that the decisions as to the recording of instruments are controlling of the case at bar, but we do contend that the reasoning is analogous, and that such decisions go much further than it would be necessary to go by the court in this case in order to decide it in our favor.

Title Passed Upon Approval of Maps.

As was said in the case of Phœnix & Eastern Railway Company vs. Arizona Railway Company, 84 Pac., 1097:

"It appears to us that the act of Congress contemplates for the acquisition of title by a railroad company that the company shall perform three acts: First, it shall file with the Secretary of the Interior a copy of its Articles of Incorporation and due proofs of its organization, thus formally advising all persons interested, and more particularly the grantor, the United States, that it proposes to avail itself of the grant; second, it shall locate its road; third, it shall file with the Register of the land office for the district where the land is located a profile of its road and secure the approval of it by the Secretary of the Interior, thus consummating the acquirement of legal title to the right of way."

The following authorities hold that the legal title vests upon the approval of the profile by the Secretary of the Interior except in cases where rights are acquired by actual construction of the road.

Noble vs. Union etc., Ry. Co., 147 U. S., 165 (37 L. Ed. 123).
Enoch vs. Spokane F. & N. Ry. Co., 33 Pac., 966.

In the late case of Cathcart et al. vs. Minnesota & Manitoba Railway Company, 34 L. D., 619 Mr. Secretary Hitchcock uses the following language:

"It would seem that the approval of the map of definite location of the right of way and station grounds and selection of said lots was an adjudication by the Secretary of the Interior that the same were needed for such purposes, and while it does not appear that said lots outside of the right of way and station grounds have as yet been used by the company in the construction, maintenance, and operation of its road, testimony was submitted to the effect that it was and still is the intention of the company to use the same for terminal purposes. If there was any part of lots three and four left to which Cathcart's right under this settlement could attach after the appropriation of the railroad company for its right of way and station grounds and the forty acres to which it was entitled under its grant, he might be allowed to make entry of said lots, subject to the company's rights to the portion claimed by it under its grant, but said company's rights appear to cover the entire lots. In view of the situation in this case it would not seem to make any difference whether the grant in question to the railroad company be held to convey a base fee or merely an easement. Under the decision of the court in the case of Northern Pacific Railroad Company vs. Smith (supra), until a forfeiture has been declared for misuser or nonuser said lots cannot be entered by Cathcart and such forfeiture could not be enforced in a private action.

As to the town-site applicants it appears that the rights of the railroad company under its grant attached on July 13, 1900, upon the filing of its map of definite location of right of way and station grounds, and appropriation of lots 3 and 4, and that the road was

constructed through said lands long prior to the passage of the act extending the townsite laws to lands within such reservation. Most of the townsite settlers came upon the land subsequent to the completion of the road or with the knowledge of its intended construction. It was held in the case of Link vs. Union Pacific Railroad Company, 6 L. D., 322, that the construction and operation of a railroad is sufficient to put subsequent settlers within the limits of the grant on inquiry as to the rights of the road and parties claiming adversely thereto."

See also:

Northern Pacific Railroad Co. vs. Smith, 171 U. S., 260 (43 L. Ed., 157).

51 Under these authorities when the Secretary of the Interior approved our maps for these station grounds at Meridian that was an adjudication of the fact that they were necessary for such purpose, and that the grant attached at the time of filing the map.

This grant having attached by the filing of the map, and our rights thereto having been adjudicated in our favor by the Secretary of the Interior, and our road having been constructed, may we ask when our rights were lost or forfeited? The Government has never complained. The United States has therefore granted us certain lands, and after such grant was made had no power to take it away from us except perhaps for fraud or some condition subsequent contained in the grant.

Necessarily, therefore, any subsequent right granted by the Government to these same lands must be subject to our right of way and station grounds theretofore granted. Certainly a third party whose rights subsequently attached under our grantor is not in a position to insist upon the United States declaring a forfeiture on account of the neglect of its own officers. The real question, as we understand it, is a question of title. The court by using the expression "forfeited" in discussing our rights seems to assume that we at one time had rights in this land. If we did if our grant ever attached then we fail to understand how we lost it, or what right the appellants here have to insist upon a forfeiture.

In the opinion of the court in this case it is said that the defendant never had any notice or information that the company claimed any more ground than was embraced in its right of way, and it does not appear that his grantor or the original settler and patentee ever had any notice or knowledge of any such claim on the part of the railroad company. It seems to us that the facts in this case very clearly show that Rowan knew of the railroad claims, as it is

52 incredible that Rowan, if he believed that he had absolute title in fee simple to this ground with the exclusive right of possession thereof never took possession and did not undertake to exercise any dominion thereover until after the year 1900. He sold lots and buildings were erected all around and adjacent to this particular tract comprising the railroad station grounds. There certainly can be no question under the evidence in this case but that both Rowan and Stalker knew that the railroad company claimed station grounds at this point. It may be that they did not know the

exact boundary lines of such station grounds, but knowing that there were station grounds at this point it certainly became their duty to inquire as to the boundary lines of these station grounds.

Again it is said in the decision:

"It seems to us that whatever right the railway company may have initiated by filing its profile map with the Secretary and procuring his approval thereof it forfeited and lost the same through failure to perfect and mature the claim by either completing the constructive notice in having the selection noted on the land office plats or in the absence of that by taking possession of the grounds claimed."

We submit that if the railroad company had any right there the only person who could take advantage of the forfeiture thereof would be the United States Government, and as long as the Government does not complain that no one else can complain. It seems, however, that this court in deciding this question has gone upon the theory that the notation upon the plats of the local land office is a condition precedent to the grant of the right of way. If that is true then no rights could be acquired by the railroad company until these plats were approved. Certainly if this act was a necessary one and one upon the performance of which our title depends, then we could not in any way acquire title unless this act was done. The rule, however, seems to be that under the Act of March 3, 1875, the grant becomes
fixed definitely either by the actual construction of the rail-
53 road before the filing of the profile thereof or in advance of construction by filing a profile as provided in Section 4.

Jamestown etc., R. R. Co. vs. Jones, 177 U. S., 125, 44 L. Ed., 698.

R. G. W. Ry. Co. vs. Telluride etc. Co., 175 U. S., 639, 44 L. Ed., 305.

This act does not operate as an absolute grant in præsenti, but instead is simply an offer to all the railroad companies and takes effect as a grant to any particular company when such company complies with the provision of the act by locating its road and filing a profile thereof in the land office, this rule, however, being subject to the qualification that the grant becomes fixed definitely by the actual construction of the railroad before the filing of the profile thereof.

Spokane Falls etc. Ry. Co. vs. Zigler, 167 U. S., 65, 42 L. Ed., 79.

In this respect we again quote the language contained in Railroad Company vs. Downey, 8 L. D., 115, this language being quoted in the respondent's brief in this case:

"It seems to me clear that the purpose of Congress in this fourth section was only to provide means by which railroads could define or definitely locate a right of way two hundred feet in width, with station grounds, etc., desired by the road, which was to be thereafter constructed, and that, as in the case of other grants or floats, the right of the grantee in its relation to settlers on public lands attached from the date of filing the map of definite location."

Also the quotation from the opinion rendered by the Honorable Secretary of the Interior in the matter of the St. Paul, Minneapolis

and Manitoba Railway Company, reported 26 L. D., 181. After quoting in full Section Four of the act of March 3, 1875, the Honorable Secretary says:

"Where a company has complied with the law by filing its Articles of Incorporation and due proofs of organization it is clearly entitled to a grant under the act of March 3, 1875 (supra). To secure this right, however, it must file maps of the location of its road, and plats of necessary station grounds. It is true the law makes the maps and plats filed by the companies subject to approval by the
54 Secretary of the Interior, and it would seem that until approved no right is vested in the company thereunder.

After filing the maps and plats as required by the statute the company has done every act necessary to be performed on its part.

Much time must necessarily elapse before these maps can go through the regular course of examination and be presented to the Secretary of the Interior for his approval.

Is the company's right in jeopardy, although it may be in the actual use of the land during this period, and can its right be made to depend upon the action of others, as would be the result of your office decision? It is not believed that such was the intention of Congress, but rather that in determining whether a map should be approved the condition existing at the time of its filing must control."

We submit, therefore, that this question is not a question of whether the appellant or the respondent were at fault or blamable or culpable because under the facts in this case neither the appellant nor the respondent were at fault or blamable or culpable. The appellant no doubt acquired the title to his property in good faith; at least there is no specific evidence that he did not acquire it in good faith. The respondent certainly acquired whatever rights it has in good faith, and under the Act of March 3, 1875, the respondent did every act and thing required of it by the statutes, but when these plats came back to the local land officers at Boise they failed to do their duty under the statute. Under the decisions above cited the right of the railroad company became definitely fixed when the maps were filed and approved by the Secretary of the Interior. There was then nothing further to do by the railroad company. These maps had passed out of their hands and out from under their control. When they were approved by the Secretary the railroad company's right attached. The railroad company had no power to compel the Register and Receiver at Boise to make notations upon Government plats. These plats upon which these notations were to be made were Government property entirely under the control of the Register and Receiver. There were simply a record in his office the same
55 as any other book or paper in the office, and if the Register and Receiver failed to properly keep his records it does not seem to us that such failure would be the fault of the railroad company or that they would be either culpable or blamable therefor. We submit, therefore, that under the decisions above cited our rights became complete when the Secretary of the Interior approved the maps, and that those rights could not be lost by the fault or carelessness or negligence of public officials.

We therefore respectfully submit that a re-hearing should be granted in this case.

Respectfully submitted,

P. L. WILLIAMS,
D. WORTH CLARK,
Attorneys for Respondent.

Endorsed: Petition for Rehearing. Filed May 28, 1907. I. W. Hart, Clerk.

56 In the Supreme Court of the State of Idaho. November Term, 1907.

(On Rehearing.)

Filed Feb. 27, 1908, I. W. Hart, Clerk.

OREGON SHORT LINE RAILWAY COMPANY, Respondent,
v.
A. R. STALKER et al., Appellants.

Railroad Grant—Right to Station and Depot Grounds—Filing of Profile Maps—Maps of Station Grounds—Approved of by Secretary of Interior—Notations of Plat of Local Land Office—Duty of Local Officers—Neglect of—Nature of Title—Title.

1. Under the provisions of section 1 of an act of Congress approved March 3, 1875, 18 U. S. Statutes at Large, p. 482, granting to railroads the right of way and station grounds through, over and upon the public lands of the United States, a right of way is granted to the extent of one hundred feet wide on each side of the central line of the railroad, upon a compliance with the provisions of said act; and there is also granted by the provisions of said section, ground adjacent to such right of way, not exceeding twenty acres for station buildings, etc., to the extent of one station for each ten miles of the railroad.

2. Under the provisions of section 4 of said act, a railroad company desiring to secure the benefits of that act must file with the register of the land office of the district where such land is located, a profile of its road, and upon approval by the Secretary of the Interior, the same shall be noted upon the plats in said office, and thereafter such lands, over which such right of way shall pass, shall be disposed of subject to such right of way. The provisions
57 of that section have no application to the method of securing station grounds.

3. Under the rules and regulations of the Interior Department, approved January 13, 1888, 12 L. D. 423, it is provided that if a railroad company desires to avail itself of the provisions of that act which grants ground adjacent to the right of way for station buildings, etc., it must file for approval in each separate instance a plat showing in connection with the public survey, the surveyed limits

and areas of the ground desired; and it is also provided in such regulations that when there is received from the office of the Secretary of the Interior a copy of an approved plat of the grounds selected by the company for station purposes, etc., the local officers will mark the township plat accordingly and make the necessary notes on the tract books, and note on the certificate of entry of any of such lands, in addition to the note concerning the right of way, that the entry is permitted subject to the use and occupation of such railroad company for station purposes.

4. Said act of 1875, contains no requirements for the filing of maps and plats designating the station grounds selected, and all proceedings relative thereto are governed by the rules and regulations of the Interior Department.

5. Where a railroad company desires to avail itself of the benefits of said act in regard to station grounds, and does everything required by the law and the regulations of the Interior Department, its right cannot be defeated through the neglect of the local officers to make the proper notation, etc., required to be made by the rules and regulations on the plats and books of such office.

6. Where the railroad company filed in the local land office a plat properly designating its station grounds on the 12th day of September, 1888, and on the following 18th day of October, an
58 entryman entered the government subdivision on which such station grounds were located, under the preemption laws, and thereafter such plats were approved by the Secretary of the Interior and returned to the local land office and the same were lost or misplaced by such officers, and the proper notations were not made by them on their plats, the right of the railroad company cannot be defeated because of such loss or neglect of duty by the local officers.

7. The grant of the right of way and ground for station building in said act, are grants in præsenti, differing only from absolute present grants in that the thing granted is indefinite and the name of the grantee is not known, and in order to make the grant effectual, it is necessary that there be a specific grantee and a definite location of the thing granted.

8. After a railroad corporation complies with the provisions of said act, such corporation becomes a grantee just as specifically and definitely as if its name had been written in said act.

9. When a grantee selects lands subject to said grant and in the mode prescribed by the Department of the Interior, and advises the Department of such selection by filing its maps, he has done all that the law requires of him, and the grant then becomes a fixity, not only as to the grantee, but as to the thing granted.

10. Neither the law nor the regulations of the Interior Department requires the grantee to go into the courts to compel the local land officers to perform the duties imposed on them by the regulations or the statute. Their neglect of duty cannot defeat the appellant's rights.

11. It is a well established rule of law that where an individual in the prosecution of a right does everything that the law requires

him to do, and he fails to attain his right because of the mis-
59 conduct or neglect of a public officer, the law will protect him.

12. The rule that the one most at fault must suffer, when two innocent persons are involved, has no application in this case, as the railroad company is not at fault in any degree.

13. It is a well established rule as to the recordation of instruments affecting real property, that when a grantee has duly deposited for record a valid instrument at the proper time, in the proper office, and with the proper officer, he has performed his whole duty, and subsequent purchasers will be charged with constructive notice, notwithstanding the officer does not spread the instrument on the records or fails to record it at all.

14. Under the provisions of said act of March 3, 1875, the nature of the grant made as to the right of way and station grounds is a base, qualified or limited fee and is more than a mere easement, giving the exclusive possession and right of use of the land for the purposes contemplated by the law, a reversionary interest remaining in the United States to be conveyed by it to the person to whom the land may be patented, whose rights will be subject to those of the grantee of the right of way and station grounds.

15. Such grounds have the attributes of the fee, to wit, perpetuity and exclusive use and possession.

16. When the Secretary of the Interior approved the maps for the station grounds in question, that was an adjudication of the fact that such station grounds were necessary for the purposes mentioned, and the grant attached, and relates back to the time of filing the maps.

17. As the grant in question took effect, the question of forfeiture of such grant cannot be raised in this case, as the United States is the proper party to raise such question.

60 18. The conclusive presumption attending a United States patent for lands proceeds upon the assumption that the patent was issued in a case where the department had the jurisdiction to execute it. But if the department had no jurisdiction to convey such land, freed from the rights of another, such presumption does not prevail.

(Syllabus by the Court.)

Appeal from the District Court of Ada County.

Hon. George H. Stewart, Judge.

Action to quiet title.

Judgment in favor of plaintiff.

Affirmed.

Hugh E. McElroy and Frank Martin for appellants.

P. L. Williams, F. S. Dietrich, Wyman & Wyman, and D. Worth Clark, for respondent.

61 SULLIVAN, *J.*:

This case was originally heard at the May term, 1907, of this court, and the opinion therein was filed on May 15th, 1907. That

opinion appears in — Pac., —, and in it the facts as stipulated and shown by the record, are set forth quite fully. A rehearing was granted and the case was again orally argued and further briefs presented by respective counsel at the November term of this court.

The main question for decision is, did Reed, the preemption claimant and patentee, under his preemption claim, take the legal subdivisions of the land included in his patent, subject to or exclusive of the Railroad Company's station grounds located thereon? It appears that Reed initiated whatever right he had to the land by a preemption filing dated October 18, 1888, and thereafter on April 24, 1889, made his final preemption proof, and later received a patent from the United States for said lands. It is stipulated by the parties that at the date of said Reed's preemption filing, the railroad was actually completed and in operation across said land, and that the railroad company caused to be made and filed in duplicate with the register of the U. S. land office at Boise City, Idaho, that being the United States land office of the district in which said land is situated, a profile or map of alignment of its said road in due form, the center line of which corresponds to the center line of said railroad as the same was thereafter constructed; that said profile map was upon February 17, 1888, duly approved by the Honorable Secretary of the Interior and sent back to the said United States land office at Boise; that said railroad from Nampa to Boise was constructed along said route prior to and was in operation on September 1st, 1888; that on September 12, 1888, said Railway Company caused to be filed in duplicate with the register of said
62 land office at Boise City, a map in duplicate showing the tract of land now in controversy claimed for station grounds, station buildings, turn-outs, side tracks, depot and water station; that said map was by the said register transmitted to the Honorable Secretary of the Interior and filed in his office September 20, 1888, and was by him approved December 15, 1888, and returned to the said register of the land office at Boise City.

And it appears from the record that the register of the local land office failed to note upon the plats in his office the station ground as shown by said maps as he was required to do by the regulations of the Interior Department concerning railroad rights of way over public lands under an act of Congress, which rules and regulations were approved by the Acting Secretary of the Interior January 13, 1888. 12 L. D. 423. This record shows that the Railroad Company did all that it was required to do under said act of Congress and the said regulations of the Interior Department, to obtain the grant of the right of way and the grant of the station grounds. That being true, the question arises, shall the Railroad Company lose its right simply because the officer of the government, to wit, the register of the local land office, failed and neglected to perform the duty required by him under said regulation, to wit, to note upon the plats in his office the station ground as indicated on said maps filed with him.

There is no provision or requirement in the act of March 3, 1875, (18 Stat. at Large, p. 482) requiring maps to be filed covering or

designating station grounds. Section 1 of said act of Congress is as follows:

"That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall
63 have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also, ground adjacent to such right of way for station buildings, depots, machine shops, side tracks, turn-outs, and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road."

And the 4th Section of said act is as follows:

"That any railroad company desiring to secure the benefits of this act shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and, upon approval thereof by the Secretary of the Interior, the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: Provided, That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road."

It will be observed from the provisions of said 1st section that "a right of way is granted to the extent of one hundred feet on each side of the central line of said road." This provision refers to the right of way; that is, the right of way granted is two hun-
64 dred feet in width, one hundred feet on each side of the central line of the road. A subsequent provision in said section also grants "grounds adjacent to such right of way for station buildings, etc., not to exceed in amount twenty acres for such station, to the extent of one station for each ten miles of its road."

The only requirement with regard to maps and plats is found in said section 4 where it is provided that the railroad company shall "file with the register of the land office for the district where such land is located, a profile of its said road," and upon approval thereof by the Secretary of the Interior, it is provided that the same shall be noted upon the plats of said office. And it is further provided that "thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way." Those provisions apply only to the right of way. Under the provisions of said act, the station grounds are no part of the right of way but are "adjacent to" the right of way. The word "profile" as used in that act, is construed to mean a "map of alignment" by the 6th section of

regulations concerning railroad rights of way, (approved by Secretary Hitchcock, February 11, 1904, 32 L. D. 481.) Under the provisions of said section 4, the railroad company desiring to acquire the benefits of said act, must file with the register of the land office for the district where such land is located, a profile of its road, and upon approval thereof by the Secretary of the Interior, such profile must be noted upon the plats of the office by the district officers, and said section also provides that "thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way." This requirement applies to the railroad right of way and has no application whatever to the station grounds provided for in the 1st section of the act, which must be "adjacent to such right of way." Said act of 1875 contains no requirement
65 for the filing of plats or maps designating the station ground selected, and the procedure relative thereto must be looked for in the rules and regulations of the Interior Department. 12 L. D. 423. In those regulations, the Acting Secretary construes portions of said act, and under the regulations therein laid down, it is provided that if the company desires to avail itself of the provisions of the law granting ground adjacent to the right of way for station buildings, etc., it must file for approval a plat showing in connection with the public surveys, the surveyed limits and areas of the grounds desired, and upon approval of such maps by the Secretary of the Interior, a copy must be transmitted to the proper district land office and upon the receipt of such copy, the local officers are required to mark the proper township plat accordingly, make the necessary notes on the tract books, and in disposing of the tracts which may be included in the grounds so selected, the officers must note on the certificate of entry, in addition to the note concerning the right of way, that the entry is permitted subject to the use and occupation of such railroad company for station purposes.

In compliance with that regulation, maps were filed by the Company in duplicate, in the local land office on the 12th day of September, 1888, showing the location of the station grounds, etc., as required by said regulation, one of which maps was forwarded to the Secretary of the Interior and approved by him on the 15th day of December, 1888, and returned to the local land office. The record shows that the Railroad Company did everything required to be done both by the act of 1875 and the rules and regulations of the Department in regard to the preparation and filing of the proper maps, but the neglect of the local officers to note on the proper plats in their office the location of such station grounds, it is claimed de-
feats the right of the railroad company to the grounds in
66 controversy. It is contended that because said officers neglected to make the proper notations on their plats as required by said regulations, the Railroad Company has lost whatever rights it might have secured had such officers performed the duty imposed on them by said regulation in that regard.

It is clear, under the stipulated facts, that the Railroad Company complied with all the duties imposed on it both by the statute and by

the regulations of the Department to secure both the right of way and the station grounds. The maps, after being returned by the Secretary of the Interior and received by the local officers, were lost without any notation having been made upon the plats in the local office. It is not claimed that the respondent was in any manner at fault in any one of those particulars, but that because of the neglect of the local land officers to make the proper notations on their plats, and the loss thereof, the railroad Company's right to the station grounds has been forfeited or never attached. It is contended that it was the duty of the railroad Company to compel the officers of the local land office at Boise to do their duty and make the proper notations upon their plats as required by the regulations of the land department. We cannot agree with that contention. It would be just as reasonable to charge the loss of the plats to the Company and hold it responsible for the loss.

Said plats were filed in the local land office on the 12th day of September, 1888, and on the following 18th day of October, patentee Reed made his entry. It does not appear from the record that said map was not on file at the time he made the entry. There is nothing in the record to show whether the final certificate to Reed or his patent was expressly subject to the railroad's right of way or station grounds. It does not appear that the final certificate or pat-
67 ent did not contain such reservations.

While the Act of March 3, 1875, is ambiguous in some respects, and its requirements are not altogether clear, the Land Department has construed some of its provisions one way and the courts another, the courts have agreed upon the proper construction of some of the provisions of said act. The courts have held that the grants provided for in said section are grants in præsenti, differing, however, from absolute present grants in that not only is the thing granted indefinite, but also the grantee is uncertain; that in order to make the grant effectual, it becomes necessary that there be a specific grantee and a definite location of the thing granted. By all authorities and decisions on the subject, it is conceded that as soon as any corporation referred to in the first section of said act filed with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization, such corporation becomes a grantee just as specifically and as definitely as if the name of the corporation were entered in the act itself. If that be true, the Railroad Company becomes the grantee of station grounds with the same force and effect as if the act of 1875 had specifically named it. The grant, however, is still a floating one until by some proper means the thing granted is located and defined. As soon as the grantee selects land subject to the grant, in the mode prescribed by the Department of the Interior, and advises the Department of such selection by filing its maps, the grantee has done all that the law requires of him, and the grant then becomes a fixity, not only as to the grantee, but of the thing granted.

But counsel for appellant contends that a notation upon the maps is a condition precedent to the grant. It is urged that the law fixes as definitely as language can the event after which the land shall be

disposed of subject to the claim of the Railroad Company, and that event is after the notations made on the plats, which act is
68 required to be made there by the rules of the Land Department and not by the law. We do not question the authority of the Land Department to make proper rules and regulations in the general conduct of its business, and it is conceded that the railroad Company complied with those rules and regulations in filing proper maps of its said station; but it contends that after it has done all that the law and the regulations require, its grant cannot be defeated by the neglect of an official to perform his duty; that its right to said station ground attached from the date of its filing the map of its station ground with the local officers and the approval thereof by the Secretary of the Interior. We fully concur in that position.

In Railroad Co. v. Downey, 8 L. D. 115, which was a case involving the station grounds of a railway company, the Honorable Secretary of the Interior said:

"It seems to me clear that the purpose of Congress in this fourth section was only to provide means by which railroads could define or definitely locate the right of way of 200 feet in width, with station grounds, etc., desired for the road which was to be thereafter constructed; and that, as in the case of other grants, or 'floats,' the right of the grantee in its relation to settlers on public lands attached from the date of filing the map of definite location."

In the case at bar the Railroad Company did file its maps of definite location of its right of way and station grounds prior to the preemption claimant filing on said land.

There is not now nor has there been at any time any statute of the United States or regulation of the Department of the Interior that makes it the duty of an applicant for a railroad right of way or station grounds to see to it that the local land officers perform the duties imposed on them by the regulations or the statute. The failure of the local officers to make the required notation on the
69 plats was nothing more nor less than the failure of such officer to properly keep a record in his office, and such failure cannot be charged up to the applicant and his rights defeated because of such neglect or failure. That neglect cannot defeat the applicant's rights as the law does not impose on him the duty of seeing to it that the local officer keeps his records as the regulations require. The respondent having complied with the law and regulations of the Land Department in filing its plats and securing the approval thereof by the Secretary of the Interior, its rights cannot be defeated because of official neglect of a clerical duty. Had Reed, the preemption claimant, made his entry prior to the date of the filing of the maps by the Railroad Company and the local land officer failed to comply with the land office regulations in regard to making the proper entry in the land office books and on the proper plats of such entry, and the railroad Company had filed the map of its station grounds subsequent to such entry, under that state of facts no one would contend that Reed had lost his prior right because the land officers had failed to make the proper entries in the land office books and plats, and it would not be necessary for Reed, under those facts,

to go into the courts to compel the land officers to perform their duty in order to protect his rights from a subsequent entryman. Neither was it necessary for the railroad company to resort to the court to prohibit the local officers from losing or misplacing the maps, nor to compel them to comply with the regulations of the Land Department in the matter of keeping their books and making the required notations on the land office plats.

In the case at bar, under the regulations of the Land Department, it was the duty of the register to make some notation whereby others might be informed as to the rights of the Company in and to said station grounds, but their failure to do so cannot work to the injury of the Railroad Company. A similar question has
70 been passed upon a number of times by the Secretary of the Interior. In the case of Goist v. Bottum, 5 L. D., 643, the Secretary of the Interior in discussing a kindred subject, uses the following language:

"Both parties throughout seem to have acted in entire good faith, and done that which the law required in order to secure title to the desired land. The whole difficulty has arisen from the failure of the local officers to keep their records properly posted. Matters being thus in equilibrio a most careful scrutiny of the whole case is imperatively demanded."

And again on page 646 of the same decision, it is said:

"It follows naturally from this premise that the failure of the local officers to have noted upon the proper records of their office his claim against said tract, cannot be permitted to work to his prejudice inasmuch as he has done all the law required of him, and the officers alone are derelict in this duty."

In the case of Linville v. Clearwaters, 11 L. D. 356, it is said:

"The entry of Clearwaters having been allowed, segregated the land, even though it may not have been entered of record, and the failure to place it of record would not affect his rights."

The Department of the Interior has, so far as we know, held to this rule, and the cases decided so holding are very numerous and among them are the following: Pomeroy v. Wright, 2 L. D. 164; Coal v. Markrey, 2 L. D. 847; Post v. Strickler, 3 L. D. 42; Hawkins v. Lann, 9 L. D. 18; Edward Young, 9 L. D. 32; Baird v. Chapman, 10 L. D. 210; Richardson v. Moore, 10 L. D. 415; Yates v. Glafeke, 10 L. D. 673.

In the Matter of Edw. B. Chase, 1 L. D. 81, the Honorable Secretary Teller said:

71 "Thus it appears in the light of the foregoing summary of the history of this case that Chase's application in question was regularly and properly made at the time when the tract applied for was vacant public land, and therefore subject to such entry. The failure or refusal of the register to accept and properly note upon their office records his original application, and amendment of the same, could not jeopardize his rights in the premises."

It is thus made to appear in the view taken of this question by the Department of the Interior, that the failure or refusal of the register

to properly note upon his office records applications for public lands would not jeopardize the rights of the parties. The rule there stated is the rule of decision as made by the Land Department, and it is also the law as laid down by the Supreme Court of the United States. In Van Wyck v. Knevеals, 106 U. S. 360, Mr. Justice Field, speaking for the court, said:

"The route must be considered as 'definitely fixed' when it has ceased to be the subject of change at the volition of the company. Until the map is filed with the Secretary of the Interior, the company is at liberty to adopt such a route as it may deem best, after an examination of the ground has disclosed the feasibility and advantages of different lines, but when a route is adopted by the company and a map designating it is filed with the Secretary of the Interior, and accepted by that officer, the route is established; it is, in the language of the act, 'definitely fixed,' and cannot be the subject of future change, so as to affect the grant, except upon legislative consent. No further action is required of the company to establish the route. It then becomes the duty of the Secretary to withdraw the land granted from the market; but if he should neglect this
72 duty, the neglect would not impair the rights of the company, however prejudicial it might prove to others."

There it is held that if the Secretary of the Interior should neglect his duty, such neglect would not impair the rights of the company, however prejudicial it might be to others. That is the decision of the court of final resort in this class of cases, and it seems to us fairly and squarely decides that the neglect of an officer cannot operate to defeat a grant.

In Lytle v. The State of Arkansas, 13 L. ed. 314, the Supreme Court of the United States lays down the general rule governing this question in the following language:

"It is a well established principle that where an individual in the prosecution of a right does everything which the law requires him to do and he fails to attain his right by the misconduct or neglect of a public officer, the law will protect him."

Under the law and regulations of the Interior Department, after the railroad company has filed its map with the local officer, its duty ends. It is made the duty of the local officer to forward the maps to the Secretary of the Interior. In approving or rejecting such maps, the Secretary of the Interior acts in a judicial capacity and after he has acted and approved the maps, the title of the company is complete. There is nothing further for the railroad company to do. As to what shall be done with the maps after the approval, and as to what record shall be kept of them is a matter solely for the Secretary of the Interior to say, as the law is silent and does not require any record to be kept thereof. As the law does not require the Secretary of the Interior or the local land officer to keep any records of station grounds, the railroad company, if it went into court for the purpose of compelling the register to make notations of such grounds on his maps, would have no law to support such action and would

only have the regulations of the Department. We conclude
73 that the failure of the land officers to do their duty could not in any way prejudice the rights of the railroad company to the station grounds at Meridian.

If it be conceded that section 4 of said act of March 3rd, 1875, has the force and effect of a statute requiring a record of an instrument affecting the title to real property, the great weight of authority seems to be that when a grantee has duly deposited for record a valid instrument at the proper time, at the proper office and with the proper officer, he has performed his whole duty and subsequent purchasers will be charged with constructive notice, notwithstanding the officer does not spread the instrument on the records or fails to record it at all. 24 Am. & Eng. Enc. of Law, 2nd ed. 71; Farabee v. McKerichan, 51 Am. St. Rep. 464.

A question is suggested as to the nature of the grant. The Honorable Acting Secretary of the Interior in a Circular approved January 13, 1888, 12 L. D. 423, declares that "The act of March 3, 1875, is not in the nature of a grant of lands; it does not convey an estate in fee either in the 'right of way' or the grounds selected for depot purposes. It is the right of use only, the title still remaining in the United States." That construction of that provision of said act was simply the opinion of the Acting Secretary of the Interior and was not binding on his successors in office, nor on the courts.

Secretary Hitchcock, in a circular containing regulations in regard to acquiring rights of way, etc., under the provisions of said Act of March 3, 1875, approved February 11, 1904, 32 L. D. 481, said:

"The act of March 3, 1875, is not in the nature of a grant of lands; but it is a base or qualified fee, giving the possession and right of use of the land for the purposes contemplated by the
74 law, a reversionary interest remaining in the United States, to be conveyed by it to the person to whom the land may be patented, whose rights will be subject to those of the grantee of the right of way."

While that definition may not be entirely clear, it indicates or contemplates an estate entirely different from a mere easement. We think that definition contemplates that the entire estate is by said act granted to the railroad company limited and qualified only in that the land shall be used for the purposes specified. If the land is forever used for those purposes, the grant is absolute and perpetual and the title will only revert when the land ceases to be used for the purposes specified.

It was held by Secretary Hitchcock in Melder v. White, 28 L. D. 412, that the Northern Pacific Railroad Company, by Section 2, Act of July 2, 1864, holds its right of way under a qualified fee which, so long as the qualification annexed is not at an end, confers upon the Company the exclusive right of possession and that a settlement upon such right of way is not a settlement upon the public land.

In Noble v. Union River L. R. Co., 147 U. S. 162; 37 L. Ed. 123,

the Supreme Court of the United States, when considering the nature of the grant under said Act of March 3, 1875, said:

"The lands over which the right of way was granted were public lands subject to the operation of the statute, and the question whether the plaintiff was entitled to the benefit of the grant was one which it was competent for the Secretary of the Interior to decide, and when decided, and his approval was noted upon the plats, the first section of the Act vested the right of way in the railroad company. The language of that section is 'that the right of way through the public lands of the United States is hereby granted to any railroad
75 company duly organized under the laws of any state or territory,' etc. The uniform rule of this court has been that such an Act was a grant in presenti of lands to be thereafter identified."

In N. P. Ry. Co. v. Townsend, 190 U. S. 267; 47 L. Ed. 1044, the court had under consideration the nature and extent of the grant of a right of way by an act, the granting clause of which is essentially the same as the granting clause in the Act of March 3, 1875. We think no material distinction can be justly drawn between the two provisions. The court said: "Following decisions of this court construing grants of rights of way similar in tenor to the grant now being considered (New Mexico v. United States Trust Co., 172 U. S. 171; Railroad Co. v. Baldwin, 103 U. S. 426) it must be held that the fee passed by the grant made in Section 2 of the Act of July 2, 1864." The court proceeds to explain the kind of title passed by said grant, and stated that the grant was for a specified purpose and the land granted must be used for the specified purpose and could not be voluntarily alienated. The court said:

"The substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad, just as though the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad right of way. In effect the grant was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted."

That is the conclusion of the court of last resort upon this question and is conclusive.

The respondent, if it has any right to the premises in controversy (and we think it has) is the owner of a limited fee and has a right to the exclusive possession of the premises, and it is not for the courts to say when and when not the railroad company shall use its
76 right of way or station grounds, as it is presumed that at all times it has need of the entire tract granted, since Congress has granted twenty acres for the purpose of station grounds. It is said in M. K. & T. Ry. Co. v. Watson, 87 Pac., 687, that "The estate granted to the U. P. Co. is corporeal in character rather than incorporeal, and corresponds to the limited fee for particular uses, subject to reverter, described in the Townsend case." The estate granted under the Act of March 3, 1875, is more than a mere easement. It amounts to a base qualified or limited fee, and so long as the company maintains its line of road and its station where said station ground is located, it has the right to the exclusive possession of the same.

In New Mexico v. U. S. Trust Co., 172 U. S. 171; 43 L. Ed. 407, the court discusses and defines the phrase "right of way." The court says:

"What, then, is meant by the phrase 'the right of way?' A mere right of passage, says appellant. Per contra, appellee contends that the fee was granted, or, if not granted, that such a tangible and corporeal property was granted," etc.

Further on in the opinion the court referred to the case of the M. K. & T. Ry. Co. v. Roberts, 152 U. S. 144; 38 L. Ed. 377, the opinion in which was written by Mr. Justice Field. Referring to the effect of that decision and the distinction between an easement and the fee, the court said:

"The effect of this decision is attempted to be avoided by saying that the distinction between an easement and the fee was not raised. The action was ejectment, and was brought in Kansas, and under the law of that state, title could be tried in ejectment. Title
77 was asserted by Roberts, who was plaintiff in the state court, and this court evidently considered it involved in the case. The langauge of Mr. Justice Field, who delivered the opinion of the court, would be unaccountable else. The difference between an easement and the fee would not have escaped his attention and that of the whole court, with the inevitable result of committing it to the consequence which might depend upon such differences."

And the court further said:

"But if it may not be insisted that the fee was granted, surely more than an ordinary easement was granted, one having the attributes of the fee, perpetuity and exclusive use and possession; also the remedies of the fee, and, like it, corporeal, not incorporeal, property."

There it is held that such grants have the "attributes of the fee, perpetuity and exclusive use and possession." There is nothing in the contention of counsel that the appellant who holds the legal title has the right to the use and possession of said station ground until it is needed by the company, as the company, under the authorities, has the exclusive right to the use, possession and occupation of the ground, whether its buildings and improvements cover it all or not.

In the former opinion of this court rendered in this case, the court proceeded upon the theory that a notation upon the plats in the local land office was a condition precedent to the grant of station grounds. If it be conceded that the act of March 3, 1875, so far as filing plats is concerned, applies to station grounds as well as to rights of way, and that the same acts must be done in order to acquire title to station grounds as to rights of way, the law seems to be that the grant becomes fixed definitely either by actual construction of the railroad before the filing of a profile map thereof, or in advance of construction by filing a profile as provided in section 4.
78 Jamestown R. R. Co. v. Jones, 177 U. S. 125; Rio Grande & Western Ry. Co. v. Telluride etc. Co., 175 U. S. 639.

It would appear from the rulings of the Land Department and the decisions of the court that the right of the railroad attached at

the date of its filing its maps. See R. R. Co. v. Downey, 8 L. D. 115. In the matter of the St. P. M. & M. Ry. Co., 26 L. D. 181, after quoting in full section 4 of the act of March 3, 1875, the Honorable Secretary said:

"Where a company has complied with the law by filing its Articles of Incorporation and due proof of organization it is clearly entitled to a grant under the act of March 3, 1875 (supra). To secure this right, however, it must file maps of the location of its road, and plats of necessary station grounds. It is true the law makes the maps and plats filed by the companies subject to approval by the Secretary of the Interior, and it would seem that until approved, no right is vested in the company thereunder.

"After filing the maps and plats as required by the statute, the company has done every act necessary to be performed on its part.

"Much time must necessarily elapse before these maps can go through the regular course of examination and be presented to the Secretary of the Interior for his approval.

"Is the company's right in jeopardy, although it may be in the actual use of the land during this period, and can its right be made to depend upon the action of others, as would be the result of your office decision? It is not believed that such was the intention of Congress, but rather that in determining whether a map should be approved the condition existing at the time of its filing must control."

See also Railroad Co. v. Downey, 8 L. D. 115; Phœnix &
79 Eastern Ry. Co. v. Arizona Ry. Co., 84 Pac. 1097; Cathcart v. M. & M. Ry. Co., 34 L. D. 619; No. Pac. Ry. Co. v. Smith, 171 U. S. 260; 43 L. ed. 157. Under those authorities, when the Secretary of the Interior approved the maps for the station grounds at Meridian, that was an adjudication of the fact that such grounds were necessary for the purposes of station grounds and the grant attached at the time of filing the maps. If the grant took effect, the question of forfeiture cannot under any theory enter into this case, for the reason that under the repeated rulings of the Land Department and decisions of the courts, the only person who is in a position to take advantage of the forfeiture of a right of way is the United States government, and, of course, under the facts as presented in this case, it would be absurd to say that the United States could forfeit the railroad company's rights on account of the failure of the register of the local land office to make proper notations upon his plats.

It is contended that Reed made final proof under his preemption filing after due notice by publication, as required by law and as the railroad company did not appear and contest his right to enter said land, the company cannot now raise the question of the validity of his entry—that it is res judicata. That contention might obtain if the Land Department had jurisdiction to convey said land free from the prior rights thereto of the railroad company, which right existed at the time the Land Department issued the patent to Reed. As that Department had no jurisdiction to act and execute said patent, unless it reserved the rights of the railroad company therein, the conclusive presumption attending patents generally does not attach

to the patent under consideration. In St. L. S. & R. Co. v. Kemp, 104 U. S., 636, Mr. Justice Field, in discussing the conclusive presumption attending a United States patent for lands, said:

80 "Of course, when we speak of the conclusive presumption attending a patent for lands, we assume that it was issued in a case where the department had jurisdiction to act and execute it."

See Patterson v. Winn, 11 Wheaton, 380. The right of the railroad company having attached to said land prior to Reed's entry the land department could not divest it of its rights by conveying the land to him, as it had no authority to do so. We therefore conclude that Reed, the patentee, did take the legal subdivision covered by his patent, which includes the lots in controversy, subject to the railroad company's right of way and station grounds, and for that reason the former decision of this court must be overruled and the judgment of the trial court must be affirmed, and it is so ordered.

Costs of this appeal are awarded to the respondent.

Stewart, J., concurs.

81 AILSHIE, *C. J.* (dissenting):

After a very careful examination of the majority opinion, and of all the cases cited by the respective parties, and all the authorities I can find upon the subject, I am satisfied that the conclusion reached by the court on the former hearing is correct and should stand as the judgment of this court. The former opinion, however, was written on the theory that the act of Congress provided for filing a profile map of station grounds and thereby prescribed a method whereby a railroad company could accept the grant and take a constructive possession of the grounds as distinguished from actual possession. Upon a further examination of this matter, I am in accord with that portion of the majority opinion, which, as I understand it, holds that the act of Congress makes no provision for filing a profile map of station grounds, and that so far as the statute is concerned there is no statutory method provided for acquiring a constructive possession of station grounds and giving constructive notice to third parties who might enter or purchase such grounds. The majority opinion, however, seems to hold that in the absence of Congressional action, the Secretary of the Interior has adopted a rule whereby he permits the railroad company to file a profile map of its station grounds at the same time and in the same manner it files a profile of its right of way, and provides that the company may have the advantage of a constructive possession of the grounds and be protected for the five year period in advance of construction of the road the same as it can for its right of way under section 4 of the act of March 3, 1875. I am wholly unable to agree with this latter proposition. I have no doubt of the right of the Secretary of the Interior to adopt rules and regulations for the transaction of the business of that department and the practice to be pursued therein. On the contrary, I am equally satisfied that the Secretary has no power or authority to adopt or promulgate any rule or order whereby preference rights may be conferred upon claimants to the public lands or

a constructive right may be initiated in violation of the statu-
82 tory rights of other claimants. The conditions on which the public lands shall be granted are prescribed by the acts of Congress and cannot be changed, supplemented or altered by the Department of the Interior. The grant conferred by the act of Congress is a mere gift made by the government to the railroad company and contains no element of a contract until after the grantee has received and accepted the gift and acted upon it. Of course, after it has entered into possession of the lands and commenced the construction of its road, it might be said to have parted with a consideration for the grant. It must be conceded that the donor, the grantor in this case, has a right to attach any conditions it sees fit to the vesting of any right in the donee. It may make that condition depend upon acts to be performed by the donee or acts to be performed by the donor, or both, or it may make it contingent upon the happening of a certain event. It has been uniformly held by all the courts that the title vests under section 1 of the act, upon the construction of the road, and that in the latter event it was unnecessary to file any maps whatever. (St. Joe, etc. R. R. Co. v. Baldwin, 103 U. S. 426, 26 L. Ed. 579; Bybee v. Oregon, etc. R. R. Co., 139 U. S. 663, 35 L. Ed. 309; Oregon Short Line R. R. Co. v. Quigley, 10 Idaho, 770.) Where, on the other hand, the company seeks to reserve the right in advance of construction of its road under the provisions of section 4 of the act, it must comply with those conditions before the lands can be said to have been legally reserved from the public domain so as to prevent any subsequent settler or purchaser from acquiring a paramount right. This latter section requires certain things to be done by the railroad company and certain things to be done by the Department of the Interior. The railroad company must file with the register of the land office (who is under the direction and control of the Secretary of the Interior and an officer of the Interior Department) a profile map of its road. The map must be approved by the Secretary of the Interior and the approval must be noted on the land office plats. The approval of the plat by the Secretary is as much an act of the government
83 and of a government official as is the notation on the plats; but according to the reasoning of my associates, the failure, neglect or refusal of the public official to perform a duty cannot prejudice a person or corporation dealing with the government. Therefore, the failure to make the notation on the plat cannot affect the railroad company. I would add further, by the same course of reasoning: "Therefore, the failure of the Secretary to approve the plats could not affect the right of the railroad company to take its right of way or station grounds." The latter conclusion is just as reasonable and logical in this case as is the former conclusion drawn by my associates. There happens to be *be*, however, authority on the latter proposition. In Phœnix — E. R. Co. v. Arizona Eastern R. Co., two railroad companies had filed their profile maps in accordance with the provisions of the act of Congress of March 3, '75, but neither one of them had been approved by the Secretary of the Interior. They went into court to determine their respective rights,

and the one that had first filed its map with the Secretary contended that its right attached and vested upon its filing the map with the Secretary. The supreme court of Arizona held in that case that no right could vest or attach prior to the approval by the Secretary; that his approval was one of the conditions precedent. The question of the proper notation on the plats did not arise in that case, and of course, was not considered. The court did use, however, the following language: "In construing the act we should note the significance of the expression 'thereafter' (that is after the approval of the profile by the Secretary and the noting of the same upon the plats in the land office) 'all such lands over which such right of way shall pass shall be disposed of subject to such right of way.' This expression is by its implication inconsistent with the theory that the legal title has passed prior to action by the Secretary." It is further worthy of note that the writer of the foregoing opinion defined "thereafter" as meaning "after the approval of the profile by the Secretary and the noting of same upon the plats in the land office."

As to the grant contained in section 1 of the act of 1875
84 being a present grant in the sense that upon the definite location of the right of way the title would be deemed to vest as of the date of the act, that has been settled beyond all question. The act is not a grant in præsenti in that sense at all, and it has never been directly so held by any court. See Spokane & N. Ry. Co. v. Ziegler, 61 Fed. 393, and cases cited; Hall v. Russell, 101 U. S. 509; Red River, etc. R. Co. v. Sture, 20 N. W. 229. This identical question was considered by the supreme court of Kansas in Chicago K. & N. Ry. Co. v. Van Cleave, 33 Pac. 475, and the case of Noble v. Ry. Co., was reviewed and considered at some length, and the conclusion was reached that the observation that the grant was one in præsenti was dicta only and not the decision of a question involved in the case.

Laying aside for the time all other considerations, it seems to me that the decisive and pivotal point to be determined with reference to station grounds is: When does the right or title or estate attach or vest in the railroad company? In the first place, the only mention of depot and station grounds to be found in the act is in section 1 thereof. Section 4, which provides for filing the profile map, makes no mention of depot or station grounds. By an analysis of section 1 we find it contains the following grants: 1st. The right of way through the public lands of the United States is hereby granted to any railroad company organized, etc. 2nd. The right is also hereby granted to take from the public lands adjacent to the line of said road, material, earth, stone and timber necessary for the construction of said railroad. 3rd. The right is also hereby granted to take ground adjacent to such right of way for station-buildings, depots, etc. Now, remembering that under section 4 the easement for right of way may be reserved for a period of five years by making a certain record, we naturally inquire how the "right to take" shall be determined as to earth, stone and timber, and also as to station and depot grounds. Bearing in mind that no method is provided for a constructive taking, we naturally inquire when the

taking occurs and what acts are necessary to constitute the
85 taking within the meaning of section 1 of the act. It is settled law that as to third parties who seek to settle upon or purchase the public domain, no lands are public lands which have been filed upon prior to the time the claim of such third party is asserted. Hastings & Dakota R. Co. v. Whitney, 132 U. S. 357, 33 L. Ed. 363; Sturr v. Beck, 133 U. S. 541, 33 L. Ed. 761; Witherspoon v. Duncan, 71 U. S. 210; Red River, etc. R. Co. vs. Sture, 20 N. W. 229. It must therefore be conceded, it seems to me, that the right to take timber and stone from lands adjacent to the line of road must be determined by the status of the land at the time of the actual taking. If at such time the land is the public lands of the United States, the company has the undoubted right to take therefrom stone, timber, etc., for the construction of its road. If, however, the land has been filed on by the homesteader or pre-emptioner prior to the date of the actual taking, then the land is no longer public lands of the United States and is not within the purview of section 1 of the act. It seems to me that same thing is true of station and depot grounds. The "right to take" grounds for such purposes must be determined by the status of the lands at the time of the actual taking. Such taking might be evidenced by staking it off and marking it on the grounds, or by fencing it or constructing buildings on it, or in any other manner that is ordinarily recognized by the law as amounting to an actual possession of real estate. In the case at bar there was not even a station at Meridian at the time the preemptioner filed on this land. The company did not take possession of the ground in any manner, nor did it do any act that evidenced its intention of claiming station grounds, nor did it make any claim to this ground for seventeen years thereafter.

It is apparent to me at once from the state of facts in this case that a grave and serious injustice and inequity will be done the entryman on this land if the railroad company is permitted at this late date to take twenty acres out of his land as claimed by the company. It is an admitted fact in the case that the preemptor filed on
the land, paid for it, and received his patent in absolute and
86 total ignorance of any claim by the railroad company, and he and his grantees continued in possession of the land for some seventeen years thereafter without the company asserting any right or claim to the station grounds or attempting to take possession thereof, and yet in the face of that state of facts, it is proposed to oust him of his possession and give this land to the railroad company. I decline to sanction a judgment that will have that effect. I am wholly unable to find a decision from any court that either supports or upholds the doctrine laid down in the majority opinion when it comes to station or depot grounds. The confusion has, in my judgment, arisen in this case in an attempt to apply the law and decisions with reference to rights of way to station and depot grounds.

If it should be admitted, on the other hand, that the grant for station grounds may be definitely located and segregated in the same method as is provided for rights of way, namely; by filing a profile

map of definite location, still it would seem that in cases where possession has not been actually taken, title does not pass until after the notation on the land office plats. It will be noticed that section 4 of the act of 1875, requires the claimant to file with the register of the land office a profile of its road and upon approval thereof by the Secretary of the Interior, and a notation thereof on the plats of the land office, that "thereafter" all lands over which such right of way shall pass shall be disposed of subject to such right of way. Conceding now that there is no necessity for a plat where the company has taken actual possession and constructed its road or station buildings, we are then reduced to the proposition that the profile map only serves the purpose of reserving the lands belonging to the United States at the time the acts required in section 4 are performed from the operation of the public land laws. In other words, it protects the company for the period of five years by giving a constructive notice which takes the place of actual occupation and reserves all rights to the company for that period of time. With this in view we must read section 4 to ascertain what acts the word
87 "thereafter" refers to. We are naturally led to the question:

Does it refer to the act of filing the profile map with the register of the land office, or does it refer to the act of approval by the Secretary of the Interior, or does it apply to the act of making the notation on the plats of the land office, or does it apply to any two of those acts, or does it apply to all of those acts? I submit that by every rule applicable to the construction of the English language, it must necessarily refer to all the acts previously enumerated, and means that after the performance of those acts the rights claimed shall be reserved to the company, and that all the lands in which such rights have been acquired, by performance of all the acts therein enumerated, shall be "thereafter" granted subject to such rights. This view is clearly indicated in the case of Noble v. Union River Logging Ry. Co., 147 U. S. 165, quoted from in the majority opinion. In that case the statement of facts was prepared by the same justice (Brown) who wrote the opinion. In making that statement he said: "In January, 1889, the company, desiring to avail itself of an act of Congress of March 3, 1875 (18 Stat. at L. 482), granting to railroads a right of way through the public lands of the United States, filed with the register of the land office at Seattle a copy of its articles of incorporation, a copy of the territorial law under which the company was organized, and the other documents required by the act, together with a map showing the termini of the road, its length, and its route through the public lands according to the public surveys. These papers were transmitted by the Commissioner of the Land Office, and by him to the Secretary of the Interior, by whom they were approved in writing, and ordered to be filed. They were accordingly filed at once and the plaintiff notified thereof." It should be observed that in this statement of facts the learned justice refers to the profile required to be filed under section 4 of the act as a "map" and to all the documents used in connection therewith as the "papers." Keeping this in mind, let us note the language used in the opinion itself. In speak-

ing of the action of the Secretary of the Interior, the writer of the opinion enumerated all the acts required by section 4 of the
88 act of 1875, and then adds that when these things were done the granting act became operative. His language is: "Upon being satisfied of this fact, and that all the other requirements of the act had been observed, he was authorized to approve the profile of the road, and to cause such approval to be noted upon the plats in the land office for the district where such land was located. When this was done, the granting section of the act became operative, and vested in the railroad company a right of way through the public lands to the extent of 100 feet on each side of the central line of the road. Frasher v. O'Connor, 115 U. S. 102 (29:311)." There the court indicated that all these acts are conditions precedent.

Further considering the power of the Secretary to act in the premises and the time when the rights of the railroad company became vested, the opinion says: "The lands over which the right of way was granted were public lands subject to the operation of the statute, and the question whether the plaintiff was entitled to the benefit of the grant was one which it was competent for the Secretary of the Interior to decide, and when decided, and his approval was noted on the plats, the first section of the act vested the right of way in the railroad company." See also Red River, etc., R. Co. v. Sture, 20 N. W. 230.

Dakota Central R. R. Co. v. Downey, 8 L. D. 115, instead of supporting the contention made by the majority of the court, is, to my mind, against its conclusion. That was a case where the railroad had already been constructed before the entryman filed upon his land, and the Secretary held that it was unnecessary in such case for the company to file its map or have any notation made on the land office plats. As heretofore suggested, the authorities are all one way on that question. In the course of that opinion the Secretary states what must be done where an attempt is made to reserve the land prior to the construction of the road, and uses the following language: "The cases in which notes are to be made on the entries of public lands are those of entries made before the construction of the road, for the purpose of excepting the grant to the
89 railroad company, thus made upon the condition that the road shall be completed within five years, or the grant shall be forfeited."

Neither is the case of Van Wyck v. Kneveals, 106 U. S. 360, in point. That case considered the act of Congress of July 23, 1866, granting a right of way to the St. Joe & Denver City R. R. Co., and also granting to the state of Kansas, for the benefit of that road, the alternate sections of land within ten miles of the line of such road. The language of that act is entirely different from the act of March 3, 1875, and the distinction has been pointed out between the two acts in many decisions since that time wherein the Van Wyck case has been considered and distinguished. See 10 notes on U. S. Reps., 391.

It is suggested by the majority opinion that the act of March 3, 1875, is ambiguous in reference to station and depot grounds. If

that be true, the majority of the court have evidently reversed the rule which requires a strict construction against a donee or grantee of the United States and in favor of the grantor. In this case, after the government had, as the railroad company claims, parted with its title to this easement, it conveyed the entire title without reservation to the pre-emptor. Now, under the rule, if there is the slightest doubt as to whether the government parted with any title upon the railroad company's application for station grounds, that doubt should be resolved in favor of the government and of its right to subsequently grant the title free of the servitude claimed by the railroad company.

In Wiggins Ferry Co. v. E. St. Louis, 107 U. S., 371, the Supreme Court of the United States said: "It is a rule of interpretation that every grant from the sovereign authority is, in case of ambiguity, to be construed strictly against the grantee and in favor of the government."

In United States v. Michigan, 190 U. S. 401, the Supreme Court, speaking through Mr. Justice Peckham, reiterated the same doctrine and, among other things, said: "Any ambiguity must operate against the grantee in favor of the public. This rule of construction ob-
tains in grants from the United States to states or corpora-
90 tions in aid of the construction of public works."

It seems to me that my associates erred when they attempted to apply to this case the rule applicable to a purchaser of land where he deposits his deed with the recorder and that officer fails to duly record the deed within the proper time. There is no question about that doctrine, and I take it no one would seriously contend that a purchaser of land would lose his property or be devested of his title by reason of the failure of the recorder to record the deed. But there is no analogy between that case and the case at bar, nor is the same principle necessary or applicable to attain the ends of justice. In this case the government says to the railroad company: We will give you certain public lands and rights that now belong to the United States, but before you can be vested with that right, and entitled to its enjoyment, you shall do certain things, and the officer of the grantor, the government, shall also do certain things. Until all those acts are performed, the grantee acquires nothing, and therefore has nothing to lose or forfeit. It is true, as stated in the original opinion, the performance of the first act creates an inchoate right which the railroad company may either mature into a vested right or it may allow it to lapse. It may never pursue its right to the extent of acquiring a property right therein either as against the government or subsequent settlers or purchasers. It is one thing to have a valuable right already acquired for which a consideration has been given, and lose that right on account of the negligence or failure to act on the part of a public official, but quite another thing to have a prospective, conditioned or anticipative right, the acquisition of which is dependent upon certain acts to be done by a public official, and which acts are never done by him. In the latter case, the failure to discharge those acts does not deprive the company of any property right because it had

not yet acquired any property right. In such case its prospects and anticipations never ripened into a legal right. It is merely a failure to vest the property right he is attempting to acquire. In this case, the railroad company has parted with no consideration and
91 is purely a donee as distinguished from a purchaser, of whatever rights it has acquired. On the other hand, the preemptor is a purchaser for value and has parted with a consideration for the property.

I am forced to the conclusion: 1st. That the railroad company in this case should be bound by the status and condition of the land as it found it at the time it sought to take the station grounds, and that the attempt to take occurred when it asserted its claim to the grounds for such purpose and attempted to take actual possession thereof. 2nd. That at the time the company sought to take the ground it was no longer public lands of the United States, but was the private property of the defendant. 3rd. That if it were conceded that the act of Congress authorizes a constructive taking and segregation of depot and station grounds, that in the case at bar the acts necessary to complete that constructive taking and appropriation within the provisions of the act were never completed in that the reservation was never made upon the land office plats, and consequently no notice thereof was ever given by either the company or the government to subsequent purchasers and entrymen. 4th. That the government never recognized the acts of the railroad company as amounting to an appropriation and segregation of station grounds for the reason that it thereafter granted the land in fee simple to the defendant's predecessor without any reservation whatever and free from the company's alleged servitude.

For the foregoing reasons, I am convinced that the judgment of this court as originally announced should stand, and I accordingly dissent from the views expressed by the majority of the court on this hearing.

92 In the Supreme Court of the State of Idaho.

ALEXANDER R. STALKER and EMALINE STALKER, Plaintiffs in Error,
vs.
OREGON SHORT LINE RAILROAD COMPANY, Defendant in Error.

Petition for Writ of Error.

Your petitioners, Alexander R. Stalker and Emaline Stalker, hereby set forth that on February 27th, 1908, the Supreme Court of the State of Idaho made and entered a final decision and judgment herein in favor of the said defendant in error, Oregon Short Line Railroad Company, and against your petitioners, Alexander R. Stalker and Emaline Stalker, the plaintiffs in error in the certain action in this court entitled, Oregon Short Line Railroad Company, respondents, vs. A. R. Stalker et al., appellants, and considering themselves aggrieved by the said final decision of the Supreme Court, petitioners pray a writ of error from the said decision

and judgment to the United States Supreme Court and an order fixing the amount of a cost bond.

Assignment of errors herewith.

FRANK MARTIN,
HNGH E. McELROY,
CARL A. DAVIS,
Attorneys for Petitioners, Alexander R. Stalker, Emaline Stalker.

STATE OF IDAHO,
Supreme Court, ss:

Let the writ of error issue upon the execution of a cost bond by the said Alexander R. Stalker and Emaline Stalker, in the sum of $500 00/100.

ISAAC N. SULLIVAN,
Chief Justice of the Supreme Court of the State of Idaho.

93 In the Supreme Court of the State of Idaho.

ALEXANDER R. STALKER and EMALINE STALKER, Plaintiffs in Error,
vs.
OREGON SHORT LINE RAILROAD COMPANY, Defendant in Error.

Assignments of Error.

Now comes the above named petitioners, Alexander R. Stalker and Emaline Stalker, and files herewith their petition for writ of error and say that there are errors in the records and proceedings of the above entitled case, and for the purpose of having the same reviewed in the Supreme Court of the United States, make the following assignments of error:

1. That the Supreme Court of the State of Idaho erred in holding that when the Idaho Central Railway Company, predecessor in interest of the defendant in error, the Oregon Short Line Railroad Company, filed in the local land office a map properly designating station grounds claimed by it on September 12, 1888, which map embraced the land in controversy, and on the following 18th day of October, one Joseph Reed, a qualified entryman, entered the government subdivision on which such station grounds were located, under the pre-emption laws, and thereafter such maps were approved by the Secretary of the Interior and returned to the local land office, and the same were lost or misplaced by such officers, and the proper notations were not, and have never been, made by them on their plats, and thereafter said entryman duly and regularly made final proof of said entry and a patent was duly and regularly issued to said entryman purporting to grant and convey to him a complete and perfect title to all of said land; that the Department of the
94 interior was without jurisdiction to dispose of said land to said patentee and that said patent was void.

2. That the court erred in holding under said state of facts, that

the grant to the railroad was perfected when the Secretary of the Interior approved the maps for the station ground in question and in holding that the grant to the railroad company was then, or ever at any time, perfected.

3. That the court erred in holding upon said state of facts that the entryman took title subject to any claim to the premises on the part of the railroad company.

4. That the court erred in holding that after a railroad corporation complies with the provisions of March 3, 1875, (U. S. Stats. at Large, p. 482, U. S. Compiled Statutes 1901, page 1568) "such corporation becomes a grantee just as specifically and definitely as if its name had been written in said act" and "that the grant then becomes a fixity, not only as to the grantee, but as to the thing granted."

5. That the court erred in holding upon the above state of facts, that when the Secretary of the Interior approved the maps for the station grounds in question, the grant was fully perfected and title passed to the Railroad Company regardless of the proper notation on the plats and regardless of the failure of the railroad company to assert claim to the premises, either by taking actual possession thereof or by appearing and asserting its claim when notice was afterwards given for final proof and patent by the entryman.

6. That the court erred in holding that the grant of the railroad company is one in perpetuity and gives exclusive use and possession for any purpose other than for use as station grounds.

For which errors the said petitioners pray that the said judgment of the Supreme Court of the State of Idaho, dated
95 February 27, 1909, be reversed and a judgment rendered in favor of said petitioners and for costs.

FRANK MARTIN,
HUGH E. McELROY,
CARL A. DAVIS,
Attorneys for the Petitioners, Alexander R. Stalker, and Emaline Stalker.

95½ [Endorsed:] Original No. —. In the Supreme Court of the State of Idaho. Alexander R. Stalker and Emaline Stalker, Plaintiffs in Error, v. Oregon Short Line Railroad Co., Defendant in Error. Petition for Writ of Error. Assignment of Errors. Filed this 15 day of Feb., 1910. I. W. Hart, Clerk.

96 In the Supreme Court of the State of Idaho.

ALEXANDER R. STALKER and EMALINE STALKER, Plaintiffs in Error,
vs.
OREGON SHORT LINE RAILROAD COMPANY, Defendant in Error.

Bond.

Know All Men By These Presents, That we, Alexander R. Stalker and Emaline Stalker, as principals, and The Idaho Title & Trust Co.

Ltd., a corporation, as surety, are held and firmly bound unto the Oregon Short Line Railroad Company, the defendent in error, in the sum of Five Hundred ($500.00) Dollars, to be paid to the said defendent in error, to which payment, well and truly to be made, we bind ourselves, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 14th day of February, 1910.

Whereas, the above named plaintiffs in error seek to prosecute their writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Idaho;

Now, therefore, the condition of this obligation is such that if the above named plaintiffs in error shall prosecute their said writ of error to effect, and answer all costs and damages that may be adjudged if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

(Signed) ALEXANDER R. STALKER.
[SEAL.] (Signed) EMALINE STALKER.
(Signed) THE IDAHO TITLE & TRUST CO., L'T'D,
By CHARLES B. COXE, *President.*

Attest:
(Signed) HARRY KESSLER,
Secretary.

Bond Approved.
ISAAC N. SULLIVAN,
Chief Justice of the Supreme Court of Idaho.

Endorsed: Bond. Filed this 15th day of Feb. 1910. I. W. Hart, Clerk.

97 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Oregon Short Line Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of Idaho, wherein Alexander R. Stalker and Emaline Stalker are plaintiffs in error and you are defendant in error, to show cause if any there be, why the judgment rendered against the said plaintiffs in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Chief Justice of the Supreme Court of the State of Idaho, this 15th day of February, 1910.

ISAAC N. SULLIVAN,
Chief Justice of the Supreme Court of Idaho.

[Seal of Supreme Court, State of Idaho.]

Attest:
I. W. HART,
Clerk Supreme Court of Idaho.

BOISE, IDAHO, *Feb. 16th,* 1910.

Wyman & Wyman, attorneys of record for the defendant in error in the above entitled case, hereby acknowledge service of the above citation.

WYMAN & WYMAN,
Attorneys of Record for Oregon Short Line Railroad Company.

98 In the Supreme Court of the State of Idaho.

ALEXANDER R. STALKER and EMALINE STALKER, Plaintiffs in Error,
vs.
OREGON SHORT LINE RAILROAD COMPANY, Defendant in Error.

Certificate of Lodgment.

I, I. W. Hart, clerk of the said court, do hereby certify that there was lodged with me as such clerk on Feb. 15th, 1910, in the matter of Alexander R. Stalker and Emaline Stalker, plaintiffs in Error, vs. Oregon Short Line Railroad Company,

1. The original bond of which a copy is herein set forth.
2. Two copies of the writ of error, as herein set forth,—one for the defendant and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Boise, Idaho, this 15th day of February, 1910.

[Seal of Supreme Court, State of Idaho.]

I. W. HART,
Clerk of Supreme Court of Idaho.

99 SUPREME COURT OF THE STATE OF IDAHO, *ss:*

I, I. W. Hart, Clerk of said court, do hereby certify that the foregoing is a true, full and complete transcript of the record of proceedings in the case of Alexander R. Stalker and Emaline Stalker, plaintiffs in error, vs. Oregon Short Line Railroad Company, defendant in error, and also of the opinions of the court rendered therein, as the same now appear on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Boise, Idaho, this 18th day of February, 1910.

[Seal of Supreme Court, State of Idaho.]

I. W. HART,
Clerk of the Cupreme Court of Idaho.

Endorsed on cover: File No. 22,056. Idaho Supreme Court. Term No. 225. Alexander R. Stalker and Emaline Stalker, plaintiffs in error, vs. The Oregon Short Line Railroad Company. Filed March 9th, 1910. File No. 22,056.

IN THE SUPREME COURT

—OF THE—

UNITED STATES

OCTOBER TERM, 1911

No. 225

ALEXANDER R. STALKER AND EMALINE STALKER,

PLAINTIFFS IN ERROR,

VS.

THE OREGON SHORT LINE RAILROAD COMPANY.

BRIEF AND ARGUMENT OF PLAINTIFFS IN ERROR

APPEAL FROM THE SUPREME COURT OF THE STATE OF IDAHO.

CARL A. DAVIS,

Attorney for Plaintiffs in Error.

BYRD - TÖRK CO., PTRS. & BOOKB.

IN THE SUPREME COURT

——OF THE——

UNITED STATES

OCTOBER TERM, 1911

No. 225

ALEXANDER R. STALKER AND EMALINE STALKER,
PLAINTIFFS IN ERROR,

vs.

THE OREGON SHORT LINE RAILROAD COMPANY.

BRIEF AND ARGUMENT OF PLAINTIFFS IN ERROR

APPEAL FROM THE SUPREME COURT OF THE STATE OF IDAHO.

STATEMENT OF THE CASE.

This is an action brought by the Oregon Short Line Railroad Company against plaintiffs in error and others in the District Court of Ada County, Idaho, to determine the right of possession of certain real estate and to secure a decree quieting the title of said Railroad Company as against said plaintiffs in error. The facts in the case were stipulated with the exception of the brief evidence of A. R. Stalker. The material facts are stipulated as follows: (See pages 8-10 of Transcript.)

I.

"The plaintiff is the successor in interest of the Idaho Central Railway Company, a corporation, organized under

the laws of Wyoming, and is the owner of all the rights and title in and to the tract of land 1304.2 feet long and 410 feet wide particularly described in paragraph II of the complaint, acquired by said Idaho Central Railway Company, a corporation, by reason of the acts and facts hereinafter particularly stated, and appearing in any further proofs which may be offered."

II.

"That said 'The Idaho Central Railway Company' at all the times herein mentioned was a railroad corporation duly organized under the laws of the Territory (now State) of Wyoming. That on July 1, 1887, said Railway Company filed with the Honorable Secretary of the Interior a duly certified copy of its articles of incorporation and due proofs of its organization under the same, as required by law and in full compliance with the rules and regulations of the Honorable Secretary of the Interior.

III.

"That said Railway Company was organized for the purpose of operating and constructing a line of railroad from Boise City, Idaho, to Nampa, Idaho, the same being the line of railroad between Boise and Nampa now owned and operated by the plaintiff, and connecting with the railroad of the Oregon Short Line Railroad Company at Nampa.

IV.

"That at all times prior to October 18, 1888, the east half of the southwest quarter and the west half of the southeast quarter of Section seven (7), Township three (3) north, Range one (1) east of Boise Meridian was (with the exception of such rights, if any, as said Idaho Central Railway Company had acquired therein by compliance with the provisions of the act of Congress approved March 3, 1875, entitled 'An Act granting to railroads the right of way

through the public lands of the United States'), unoccupied and unclaimed public land of the United States. That upon said October 18, 1888, one Joseph G. Reed, being duly qualified so to do, filed upon said tract of land, in the Land Office, Boise City, pre-emption entry No. 4011, claiming residence established the same day. That thereafter, to-wit, on April 24, 1889, said Reed made final proof upon said tract of land, and patent issued to him therefor August 4, 1891. That said lands and the other lands in said township were surveyed and opened to entry upon the 1st day of July, 1875.

V.

"That upon June 10th, 1887, the Board of Directors of said Idaho Central Railway Company adopted a route for its said railroad from Nampa to Boise City, said route being the same as that now occupied by said railroad track, the center line of said railroad track corresponding to the center line of said route, and said track always having been in the same place, that is, the identical place now occupied by the same. That said route passed and passes over and through said tract of land so entered by said Reed.

VI.

"That thereafter said Idaho Central Railroad Company caused to be made and filed in duplicate with the Register of the United States Land Office at Boise City, Idaho, the same being the Land Office of the District in which said land was and is situated, a profile or map of alignment of its said road in due form, the center line of which corresponds to the center line of said railroad as the same was thereafter constructed, and has ever since been maintained and now exists over and across said tract of land. That said profile map was upon February 17, 1888, duly approved by the Honorable Secretary of the Interior, and sent back to the said Land Office at Boise.

VII.

"That said railroad from Nampa to Boise was constructed along and upon said route prior to, and was in operation upon, September 1, 1888.

VIII.

"That upon September 12, 1888, said Idaho Central Railway Company caused to be filed, in duplicate, with the Register of said Land Office at Boise City, a profile map showing said tract of land as described in the complaint and hereinbefore described, and claiming the same as station grounds for station buildings, turnouts, sidetracks, depot, and water station. That said profile map of said station grounds was by the said Register transmitted to the Honorable Secretary of the Interior, and filed in his office September 20, 1888, and by him approved December 15, 1888, and then returned to the said Register of said Land Office.

IX.

"That said Joseph G. Reed, by warranty deed conveyed to W. H. Rowan, the land embraced in his said pre-emption entry, and for which patent issued to him August 4, 1891, as hereinbefore stated.

"That thereafter said Rowan executed and filed a plat with the County Recorder of Ada County, Idaho, covering a portion of said land embraced in said pre-emption entry, and a portion of said tract claimed by the plaintiff as its station grounds, said plat being designated as Rowan's Addition to the town of Meridian, and thereupon said Rowan conveyed to said defendants, A. R. Stalker and Emaline Stalker, lots 5, 6, 7 and 8, in block 4, of said Rowan's addition, all of which said lots are embraced within said tract claimed by plaintiff as its station grounds.

(Also, on pages 10-11 .)

"It is further agreed that the attached copy of the minutes of a meeting of the board of directors of the said Idaho

Central Railway Company, is a correct copy of the minutes of the meeting of the Board of Directors of said Idaho Central Railway Company, held August 6, 1888, as said minutes appear in the minute book of the said Company. And that said minutes refer to and authorize the execution and filing by the officers of the said Idaho Central Railway Company, of the original map or plat of which the attached blue print is a copy.

"It is further agreed that the Register and Receiver of the said United States Land Office at Boise, Idaho, upon the return of the said profile or plat of the said depot grounds, after the same had been approved by the Secretary of the Interior, failed and neglected to note the same upon the plats in the said Land Office, and that the same has never been noted upon the said plats to this date; and that at all times since the commencement of this action said profile or plat has been missing from the United States Land Office and cannot be found."

A summary of the conflicting claims of the parties is as follows: One Joseph G. Reed made pre-emption entry of this land on October 13, 1888, and patent issued to him therefor August 4, 1891. Said Reed conveyed to W. H. Rowan. Said Rowan platted this ground as Rowan's Addition to the town of Meridian. Subsequently, Rowan conveyed Lots 5, 6, 7 and 8 in Block 4 of said addition to Alexander R. Stalker and Emaline Stalker, plaintiffs in error. In other words, plaintiffs in error hold fee simple title through patent direct from the United States.

The Railroad Company claims title by virtue of a certain map, purporting to claim 20 acres of ground as station grounds adjoining its line of railroad, filed with the Register of the United States Land Office at Boise, September 12, 1888, and transmitted by him to the Secretary of the Interior. This map was approved by the Secretary of the Interior and returned to the Register and Receiver of the

United States Land Office at Boise, Idaho, but the Register and Receiver "failed and neglected to note the same upon the plats in the said land office, and that the same has never been noted upon the said plats to this day; and that at all times since the commencement of this action, said profile or plat has been missing from the United States Land Office and cannnot be found.

The laws of the United States bearing upon this case are as follows:

Section 1 of the act of March 3, 1875, grants to certain railroads right of way through public lands of the United States "to the extent of one hundred feet on each side of the central line of said road; * * * also ground adjacent of such right of way for station buildings * * * not to exceed in amount 20 acres for each station, to the extent of one station for each ten miles of its road."

Section 4 provides for the filing of a profile of the road in the local land office and that "upon approval thereof by the secretary of the interior the same shall be noted upon the plats of said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way." (See 18 Stat. L. 482.)

Upon the passage of said act, the secretary of the interior promulgated certain regulations, among which are the following:

"When there is received from this office a copy of an approved plat of grounds selected by a company, under the act in question, for station purposes, etc., they will mark the proper township plat accordingly, make the necessary notes on the tract books, and in disposing of the tracts which may include the grounds so selected the officers shall note on the certificate of entry in addition to the note concerning the right of way, the entry is permitted subject to the use and occupation of the company (naming it) for station purposes, etc." * * *

"The act of March 3, 1875, is not in the nature of a grant of lands; it does not convey an estate in fee, either in the 'right of way' or the grounds selected for depot purposes. It is a right of use only, the title still remaining in the United States."

"All persons settling on public lands to which a railroad right of way has attached, take the same subject to such right of way and must pay for the full area of the subdivision entered, there being no authority to make a deduction in such cases."

See circular of January 13, 1888, found at page 423, Vol. 12, Decisions of Department of Interior.

Upon said state of facts, the Supreme Court of the State of Idaho has held that upon approval of the map of the Railroad Company by the Secretary of the Interior, the property in controversy was absolutely granted to the Railroad Company regardless of any proceedings subsequently had for the disposition of the land.

SPECIFICATIONS OF ERROR.

Plaintiffs in error specify the following errors upon which they will rely on this appeal, based upon the assignment of errors heretofore filed: (See pages 13 of the Transcript.)

1. That the Supreme Court of the State of Idaho erred in holding that when the Idaho Central Railway Company, predecessor in interest of the defendant in error, the Oregon Short Line Railroad Company, filed in the local land office a map properly designating station grounds claimed by it on September 12, 1888, which map embraced the land in controversy, and on the following 18th day of October, one Joseph Reed, a qualified entryman, entered the government subdivision on which such station grounds were located, under the pre-emption laws, and thereafter such maps were approved by the Secretary of the Interior and returned

to the local land office, and the same were lost or misplaced by such officers, and the proper notations were not, and have never been, made by them on their plats, and thereafter said entryman duly and regularly made final proof on said entry and a patent was duly and regularly issued to said entryman purporting to grant and convey to him a complete and perfect title to all of said land; that the Department of Interior was without jurisdiction to dispose of said land to said patentee and that said patent was void.

2. That the court erred in holding under said state of facts, that the grant to the railroad was perfected when the Secretary of the Interior approved the maps for the station ground in question and in holding that the grant to the railroad company was then, or ever at any time, perfected.

3. That the court erred in holding upon said state of facts that the entryman took title subject to any claim to the premises on the part of the railroad company.

4. That the court erred in holding that after a railroad corporation complies with the provisions of March 3, 1875, (U. S. Stats. at Large, p. 482, U. S. Compiled Statutes 1901, page 1568) "such corporation becomes a grantee just as specifically and definitely as if its name had been written in said act" and "that the grant then becomes a fixity, not only as to the grantee, but as to the thing granted."

5. That the court erred in holding upon the above state of facts, that when the Secretary of the Interior approved the maps for the station grounds in question, the grant was fully perfected and title passed to the Railroad Company regardless of the proper notation on the plats and regardless of the failure of the railroad company to assert claim to the premises, either by taking actual possession thereof or by appearing and asserting its claim when notice was afterwards given for final proof and patent by the entryman.

6. That the court erred in holding that the grant of the railroad company is one in perpetuity and gives exclusive

use and possession for any purpose other than for use as station grounds.

For which errors the said petitioners pray that the said judgment of the Supreme Court of the State of Idaho, dated February 27, 1909, be reversed and a judgment rendered in favor of said petitioners and for costs.

ARGUMENT.

Briefly stated, there are two questions before the Court for determination:

1st. *Did Reed, the patentee, take legal sub-divisions covered by his patent subject to or exclusive of the Railroad Company's claim for station grounds described in its map?*

2d. *If Reed took said ground subject to the claim of the Railroad Company, what is the character of that claim? Is it a mere easement or an absolute title in fee simple?*

The Court below held that Reed did take the legal divisions covered by his patent subject to the claim of the Railroad Company, and that the Railroad Company by making that claim had acquired title in fee simple to the premises.

Respondents contend that the Railroad Company did everything required of it in the premises, and that it was not responsible for the failure of the officials in the Boise Land Office to make the proper notations upon the plats in their office showing this ground as station grounds.

Plaintiffs in error contend, however, that this land was never segregated from the public domain for the purpose of station grounds, and that under the express terms of the statute, it could only be segregated by the notation upon the plats. That until such notation was made, the application for the segregation of this land was denied. That upon the denial of its application, in this manner, it was incumbent on the Railroad Company to proceed as in case of an ordinary rejection of an application to enter land; and that the proceedings under which patent was issued are, in effect,

proceedings *in rem* under which jurisdiction was acquired of the Railroad Company, and it was notified to appear and set up its claim to this land, and failing to do so, the patent, when issued upon a clear record in the Land Office, vested title in fee simple in the patentee, clear of any claim for depot grounds on the part of the Railroad Company.

In other words, they claim that parties seeking to enter land which is not in the possession of the Railroad Company, have the absolute right to rely upon the records of the Land Office, and the adverse claimant, if any there be, must appear pursuant to the notice given of final proof and set up its claim or be forever barred.

1st. *Did Reed, the patentee, take legal sub-divisions covered by his patent subject to or exclusive of the Railroad Company's claim for station grounds described in its map?*

The railway company sought to secure the benefit of this law, a gift pure and simple. It filed its claim in due form and it regularly passed through the routine procedure until it returned to the Boise land office, where the officials wholly failed in the performance of their duty. Aside from the officials, no one knew of this neglect except the claimant, the railway company. It was absolutely necessary to the protection of their claim that it should be noted on the plats in order that the lands should be disposed of subject to their claim. The statute says that upon approval by the secretary the same shall be noted on the plats of the local land office, and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way.

The law fixes as definitely as language can the event after which the lands shall be disposed of subject to this claim and it is conceded that such event has never yet taken place and the lands in controversy were disposed of free of this claim.

Counsel have urged that respondent was not to blame for

the neglect of the officials of the land office; but as between plaintiff and these defendants, it was to blame. The party who is seeking to secure the benefit of legislation of this character must prosecute his claim to a final determination at his own risk. Under the plain language of the law, the claim for this ground was valueless until it was entered on the records of the local land office. Upon failure of the local officials to do their duty, claimant had ample protection, under the rules of practice there. It was the only party to that proceeding and upon refusal of the officers to do their duty, it had the right to appeal to the commissioner and compel performance of duty. As between respondent and the patentee and his assigns, the neglect of the officers became the neglect of the claimant itself.

The court below held that the railroad company should not suffer on account of the neglect of the officers to do their duty—which was all right as between the railroad company and those officials; but as between the railroad company, who either actually knew of this default on the part of the officers or were themselves negligent in pressing their claim and demanding their rights, and a subsequent entryman of this land, who in the nature of things could not learn of this application even by the utmost diligence, there seems no room for doubt as to where the equities lie. This claim was being made at the time of the construction of this road through what was then a desert. It does not appear that there was any settlement or that the trains even stopped at this point. The entryman applies for the land and finds the record absolutely clear. If he knew the law, he knew that he could safely proceed since no claim was noted on the records. Examination of the record will show that only a part of the depot ground claimed conflicted with the Reed entry. How could Reed know of this claim unless the railroad company or the land officers originally receiving the same gave him that information? Besides, the law explicit-

ly declares that thereafter (referring to the notation on the records) "all such lands over which such right of way shall pass shall be disposed of subject to such right of way."

Our Idaho law provides for abstracts of title given by bonded abstracters backed by heavy bonds. Such an abstract in a case like this, showing as it must an absolutely clear record title from the government, must either be valueless to the person dealing with the land or else will hold a perfectly honest and competent abstracter to a heavy penalty. The abstracter, no more than these defendants, could divine that a patent regularly issued could be subject to a secret claim.

There is no question as to the title of respondent to its right of way for its track. In case of O. S. L. Ry. vs. Quigley, 10 Idaho, 782, the Court held that the track itself gave actual, rather than constructive, notice to all of the world, as to the exact location of this right of way. By the actual construction of the track on the ground notice was given to land claimants without the necessity of consulting records and files of the land office in order to ascertain the definite location of such road.

But the construction of the line of road cannot constitute either actual or constructive notice to any one that the railroad company claims depot grounds or what grounds, if any, are claimed for such purpose. The law definitely fixes the right of way for track purposes as "one hundred feet on each side of the central line of said road," but is silent as to the location of the station grounds. That is left entirely to the claimant and the public is only advised thereof by the notation on the plat. This claim might have been made for ground on the south side of the track instead of the north side as well as some other shape than that claimed here. If plaintiff's contention is correct, then all parties entering public lands at any point near enough the track so that depot grounds of any possible shape might conflict therewith,

as well as their grantees, hold indefinitely subject to a claim of which they cannot learn with the utmost diligence.

Appellant is here asking this court to give due faith and credit to proceedings had before the Land Department of the United States whereby such lands have been disposed of by patent, when the title of parties claiming under such patent is challeneged in a collateral proceeding.

We alleged and proved by stipulation that we were grantees of the patentee, Reed.

There seems to be no dispute as to the exclusive jurisdiction of the Land Department of the United States to dispose of the public lands and that a patent issued by the land department in the exercise of that jurisdiction cannot be collaterally attacked.

"A patent issued under the pre-emption laws of the United States, is evidence that all previous steps had been regularly taken to justify the making of the patent; and one of such steps being an order from the secretary to the register to offer the land for sale because the warrior had abandoned it, the court it bound to presume that such order was given and such fact is not open to controversy.

"The presumption is that the patent was valid and passed the legal title."

Minter v. Crommellin, 18 How 87.

"A patent for lands issued by the United States is conclusive in an action at law as to the legal title, and cannot be collaterally impeached in such action, unless it is absolutely void on its face, or is issued without authority."

St. Louis Smelting & Refining Co. v. Kemp et al., 104 U. S. 636.

The decision in the foregoing case by Justice Field, contains an exhaustive review of the jurisdiction of the Land Department and the circumstances under which a patent may be attacked.

The court says:

"The execution and record of the patent are the final acts "of the officers of the government for the transfer of its "title, as they can be lawfully performed only after "certain steps have been taken, that instruments, duly "signed, countersigned and sealed, not merely operates to "pass the title, but is in the nature of an official declaration "by that branch of the government to which the alienation "of the public lands, under the law, is intrusted, that all the "requirements preliminary to its issue have been complied "with. The presumptions thus attending it are not open to "rebuttal in an action at law. It is this unassailable char- "acter which gives to it its chief, indeed, its only value, as a "means of quieting its possessor in the enjoyment of the "lands which it embraces. If intruders on them could com- "pel him, in every suit for possession, to establish the valid- "ity of the action of the Land Department and the correct- "ness of its ruling upon matters submitted to it, the patent, "instead of being a means of peace and security, would "subject his rights to constant and ruinous litigation."

"Of course, when we speak of the conclusive presumption "attending a patent for lands, we assume that it was issued "in a case where the department had jurisdiction to act and "execute it."

In that case, quoting from Patterson v. Winn, 11th Wheaton, 380, the court said:

"We may, therefore, assume as the settled doctrine of this court, that if a patent is absolutely void on its face, or the issuing thereof was without authority, or was prohibited by statute, or the state had no title, it could be impeached collaterally in a court of law in an action of ejectment, *but, in general, other objections and defects complained of must be put in issue in a regular course of pleading in a direct proceeding to avoid the patent.*" (*Italics in the original.*)

The exceptions above noted seem to completely cover all of the cases, where the patent can be collaterally attacked. Further on the court says:

"The general doctrine declared may be stated in a different form, thus: a patent, in a court of law, is conclusive as to all matters properly determinable by the Land Department, when its action is within the scope of its authority, that is, when it has jurisdiction under the law to convey the land. In that court the patent is unassailable for mere matters of judgment. *Indeed, the doctrine as to the regularity and validity of its acts, where it has jurisdiction, goes so far that if any circumstances under existing law, a patent would be held valid, it will be presumed that such circumstances existed.*" (Italics are ours.)

"Gonzales having made final proof, after due notice by publication as required by law, the question of the validity of his claim is res judicata so far as the railroad company is concerned. Gonzales v. Atlantic & Pacific R. R. Co.

1 L. D., 361.—This was a case in which the lands claimed by the settler was within the limits of the railroad grant.

In Gilbert v. S. J. & D. R. R., 1 L. D., 465, Secretary Kirkwood said:

"As to the third point, to-wit, that the company waived nothing by its failure to appear at the hearing, as its claim was of record, and it was not therefore obliged to select the tract in question, etc., it is only necessary to state that while it is true that a railroad's right to lands within the granted limits by virute of a grant in praesenti is a title of record, which the department, in the absence of an adverse claim thereto, would recognize, and renders the lands properly subject to selection, it is equally true that railroad companies are invariably required to select their lands at the proper local office and pay the regular selection fee therefor; that in all contested cases, when duly and regularly cited thereto upon the motion of an adverse claimant, they are

invariably held to be amenable to such citation; it being the purpose of the law making power to protect all homestead and pre-emption entries made in good faith, and to require the railroad company to assert title to its lands before a bona fide settler had obtained even color of title from the United States. Consequently, when said Saint Joseph and Denver City Railroad Company failed to assert title to the tract in question by attending said hearing, it may be considered as having thereby waived its right to object to the consummation of Gilbert's title to the same."

Under these decisions we urge that even if respondent's claim had been noted on the records of the local land office, it would still be necessary as against a ptentee of the same lands, that respondent show title, either by reservation in the patent or by proof of actual possession and appropriation of the property prior to final proof by the entryman.

It is clear that the mere ex-parte action of the Land Department in approving the plat and even noting on the records cannot amount to a "disposition" of the public lands any more than does the acceptance and filing of the original application of the homesteader, since at that point no action has been taken to secure jurisdiction or adverse claims. The adverse contention would produce a remarkable situation: Railroads could patent rights of way in an ex-parte proceeding of which adverse claimants could not learn with the utmost diligence until after the "disposition" had been made of the land. The entry of the claim on the records of the local office would then advise the entryman of conclusive action previously had. The entryman would learn from this notice that his adverse claim had already been adjudicated without knowledge or notice on his part. A reasonable view of the law requires that the acceptance and notation of the plat of the right of way merely forms the basis of the claim of the railroad as does the original application of the homesteader and that the rights thereby initiated will be pro-

tected when the land is disposed of by the government. In fact, this law expressly speaks of the disposition of the land being made "thereafter." Respondent is contending that the mere initiation of the right of the railroad company by approval of the secretary, something less, even, than noting on the record of the local office, completely exhausts the jurisdiction of the land department, long prior to final proof by the entryman, or even knowledge or means of knowledge by the entryman of the very existence of the adverse claim, and thereby title is acquired of a sufficiently high nature to overcome the patent of the government, in a collateral proceeding outside the Land Department. The unfortunate entryman is not even entitled to knowledge that a superior adverse claim has been allowed by the government, until such time in the future as the railway may choose to assert it collaterally, ignoring the jurisdiction of the Land Department. We can readily understand how the officers of the land department might be permitted ex-parte to approve and file claims which would thereafter by reason of priority prevail as against the entryman when he came to make final proof, thus requiring him upon such final proof either to establish priority or take the land "subject" to the use of the railroad, but that the law contemplates that mere approval and filing of a plat shall be considered a final "disposition of the land and thereby the claimant becomes in effect a "patentee," who may thereafter ignore the notice given upon final proof by the entryman, preliminary to patent, and rely upon the title thus acquired as against a regularly issued patent of the United States, seems directly contrary to the uniform decisions of the courts construing the land laws, which declare that the issuance of the patent legally determines and concludes all adverse claims. We respectfully urge that the notation of the claim on the record, is merely a part of the action of department in approving the claim, and rather the beginning than the ending of

the jurisdiction of that department, since that jurisdiction ends only with the issuance of patent. If this were not true the entryman holding a claim adverse to the railroad would never have his day in court in the Land Department to establish his claim, and a patent regularly issued might be worthless although the patentee might endeavor with the utmost diligence to learn whether or not the adverse claim existed. An abstract of title would be of no value whatever as against this unknown and undiscoverable claim.

We think the entire issue may be stated in a single question: When and where could Reed, the entryman, invoke the jurisdiction of the Land Department of the United States and have determined by it the adverse claim of respondent as to all matters cognizable by the Land Department—that is, those matters of which the department has exclusive jurisdiction and of which the courts have no jurisdiction in a collateral proceeding?

Our answer is that Reed properly and successfully invoked that jurisdiction when final proof was made at which time respondent permitted its claim to go by default, all of which is proved by our patent.

Respondent's claim has been conclusively determined by the Land Department of the United States.

In Atlantic & Pacific R. R. Co. v. Forrester, 1 L. D., 475, Secretary Teller approved and followed the decision of Secretary Kirkwood, saying:

"In the light of this precedent, I am constrained to the opinion that the company, having failed to answer the regular citation issued upon Forrester's motion, was guilty of laches, by reason of which it may be held to have waived its right to assert title to the tract in question, or to object to the consummation of his claim to the same."

The "regular citation" referred to by Secretary Teller was the usual notice of final proof under homestead entry.

In case of Atlantic & Pacific R. R. Co. v. Buckman, 3 L. D. 276, Buckman proved up, after due notice by publication. "The company failed to appear and object to his final proof: held that, by reason of their failure to then appear and object, they cannot be heard to object now."

In re Matthew Sturm, 5 L. D. 295, the opinion says:

"March 19, 1883—more than four years after Sturm had submitted final proof, as above stated—the railroad company filed protest against the allowance of said entry. Having failed to appear in response to the citation issued preliminary to the taking of final proof by Sturm, the company is in default and has no standing before the department."

"The notice of intention to make final proof given in accordance with the act of March 3, 1879, is an invitation to any and all parties to appear and show cause why the entry should not be allowed. The failure of a railroad company, claiming, previous to selection, under a prior indemnity withdrawal, to thus appear and assert its claim is conclusive."

Brady v. Southern Pacific R. R., 5 L. D. 407.

"An entry within the limits of a prior railroad indemnity withdrawal, should be approved for patent, on final proof offered and accepted after due notice, without protest or appearance on behalf of the railroad company."

Iverson v. St. Paul M. & M. Co., 5 L. D. 586.

"The right of selection within indemnity limits is a preference right that may be asserted against every one, but failure to assert such right, after due notice of a settler's intention to make final proof for land within said limits, is a waiver of said right, and will, after proof and payment, estop the company from setting up the illegality of the entry."

Brady v. Southern P. R. R. Co., 5 L. D. 658.

"The failure of a railroad company to appear in response to final proof notice, given in accordance with the act of March 3, 1879, and assert its right to land claimed by virtue of its being within granted limits, precludes the subsequent assertion of such right."

N. P. R. R. v. Dow, 8 L. D., 389.

In Randolph v. Northern Pacific Ry., 9 L. D. 417, the facts establishing the right of the railway company were a part of the record and the secretary holds that "By failure of a railroad company to respond to notice of intention to submit final proof it waives all rights to deny facts set up in said proof; but if the record shows that the land passed under the grant the award should be in favor of the company notwithstanding its default."

Assume, for the sake of argument, that the claim of respondent had been of record, as was that of the Northern Pacific Ry. in the above case, and also assume that the local office refused to comply with the regulations of the department quoted on page 6 of our brief and had failed to "note on the certificate of entry in addition to the note concerning the right of way, the entry is permitted subject to the use and occupation of the company (naming it) for station purposes, etc." would it not then have been the duty of the respondent to appeal to the Secretary of the Interior as did the railroad company in that case, and also in the cases cited by respondent involving rights of way?

We respectfully submit that respondent is seeking to do in this court what it should have done when "regularly cited" in the Land Department when Reed made final proof. Did the department have jurisdiction? If so, the respondent has no standing here. Does respondent claim that the Land Department and the lower court had concurrent jurisdiction? If not, then where does the jurisdiction of the Land Department end and that of the lower court begin?

What does our patent prove? Judge Field, as heretofore

cited, said that this patent is an "official declaration * * * that all requirements preliminary to its issue have been complide with. The presumption thus attending it are not open to rebuttal in an action at law." He further says that the only cases where it may be collaterally attacked are:

1. Where it was void on its face.
2. Where it was issued without authority.
3. Where it was prohibited by statute.
4. Where the state had no title.

In all other cases, a direct proceeding must be brought to avoid the patent. If this proceeding were brought in the land office, the authorities we cite hold that the final proof proceedings are conclusive—plaintiff has already had his day in court as to all matters of which the land office had jurisdiction. If a proceeding of this kind were brought in a court of equity—if such a court could have any jurisdiction—it would be necessary for plaintiff to allege and prove that Reed, the patentee, was a party to the fraud. It therefore seems to us that the case of respondent is left without a peg to stand on.

We wish to cite the following additional decisions from the Land Department:

"A railroad that fails to respond to the settler's notice of intention to submit final proof is bound by the record in the proceedings."

Atlantic & Pacific R. R. Co. v. Armijo, 9 L. D. 427.

In that case the fact that the land was within the granted limits and that the line of road was definitely located, did not relieve the company from the necessity of presenting its claim.

"General notice of intention to make final proof is legal notice to a railroad company, and if it fails to respond thereto it will be as effectually bound by the record as though present."

Catlin v. N. P. R. R. Co., 9 L. D. 423.

See also to the same effect:

Florida Ry. & Navigation Co. v. Dodd, 11 L. D. 91.
Northern Pacific R. R. v. Harendrup, 11 L. D. 633.

In case of the Dakota Central Railroad Company v. Downey, 8 L. D. 115 (cited by respondent in lower courts at page 20, Supp. brief), the Secretary considered the appeal of the railroad from an order "refusing to have notes made upon the entry papers of said Downey, in order that the patent *when issued* might contain a reservation of the company's right of way, and right to the use and occupation of twenty acres for station purposes."

It appeared that Downey had made a timber culture entry of premises claimed by the Railroad company for station purposes and the company was seeking to have notes made on the entry papers of Downey "In order that the patent when issued" might contain a reservation of the company's right in the premises. It will be observed that Downey was not yet attempting to make final proof and upon such a state of facts the Secretary held that for the time being the rights of the company were not jeopardized, it being admitted that the entry of Downey was made after the construction of the road over the land in question. In other words, the issue would arise between Downey and the railroad company, as to their adverse claims, when he should offer final proof. In concluding the opinion the secretary says that "a proper administration of the statute authorizes a statement in the patent, *when it shall be issued*, that the grant is subject to rights acquired by the railroad company under the act of March 3, 1875," but does not attempt to determine what those rights are.

The brief citation of respondent in lower courts from the above case closes with the following words: "The right of the grantee in its relation to settlers on public land attached from the date of filing a map of definite location."

It should be noted that the "map of definite location" referred to is the original map showing the location of the line of road and that the Secretary merely holds that the subsequent location of depot grounds, if fully consummated, will relate back to the filing of the map of definite location, or, in lieu thereof, to the actual construction of the line of road; and that, in any event, such adverse claims are to be determined when patent issues. On page 117, the Secretary says that while this law makes a present grant of right of way, it is indefinite both as to location and grantee. "There must remain afterwards the necessity, in order to define the subject granted, to give fixity of location to the *land*. The same rule ought to determine the time when the grant becomes attached to particular land, which has been declared by the Supreme Court in respect to other cases of grants of floats. The act fixes this. * * * As to the construction of the roadway, the construction of the road fixes the boundaries of the grant, and fixes it by the exact rule of the statute. As to the grounds for station buildings, etc., the right is absolute as to the quantity named, for one station to each ten miles of the road. (Perhaps the approval of the department is necessary to its specific definition; but that needs not now to be decided.)"

The Secretary holds that the boundaries are fixed by the exact language of the statute and that the station grounds in the nature of things must be specifically defined and that this grant is nothing but a float until something is done to give "fixity of location to the land." He also holds that the rights of the railroad are to be protected in the patent to the entrymen. As applied to the case at bar, this claim never having been entered on the records of the land office, we think it is still a "float" and the lands having gone to patent, it was the duty of the railroad company to invoke the jurisdiction of the land department, by appeal or otherwise, as was done by the railroads in the numerous cases cited. It,

alone, had jurisdiction to *dispose* of this land and having done so, it is incredible that there should be a secret, adverse claim cognizable here, which the law did not require should appear of record in the land office and was not barred by the proceedings there.

Respondent has cited, St. Paul, Minneapolis & Manitoba Ry. Co., 26 L. D. 181. In that case, before the plat was approved by the Secretary, entry was made of the land. It was purely an ex parte proceeding, the action of the Commissioner was clearly wrong, and the decision of the Secretary was "The plat is approved, subject to any valid adverse right." But what is meant by approving the claim *subject to any valid adverse right?*" Respondents are claiming here that the action of the Secretary in approving their plat of depot grounds absolutely granted them title—a title wholly independent of the further jurisdiction of the land department and which is sufficient as against the patentee in a collateral proceeding. On the other hand, we assert that an application which is exparte can only be allowed by the Secretary "subject to any adverse right" and that the action of the Secretary cannot in any manner prejudice the assertion of the adverse claim of the entryman and that the action of of the Secretary does not amount to a *disposition* of the land by the government, any more than the acceptance of the original application for entry by the homestead or other land claimant. The final and complete jurisdiction of the land department is only exercised and exhausted when patent issues, and any and all adverse claimants claiming through the government, except on actual patentee, are cited into court by notice of final proof, and their rights are completely determined by award of patent.

Counsel refer to a decision which they say is in 28 L. D. 402. No such decision appearing at the place stated, and the title of the case not appearing, we are unable to consider that case.

Respondent cites Phoenix & Eastern Railway Co. vs. Arizona Railway Co., 84 Pac. 1097.

An examination of that case will show, as we believe, that it sustains our contention at every point, both as to the jurisdiction of the U. S. land office and as to the necessity of notation on the plat of the local office. That was a controversy for posession of right of way claimed adversely by two railroads. Each company "Was seeking the approval by the Secretary of the Interior, of its profile, and each was resisting the approval of the profile filed by the other. At the time of the trial the Secretary had not approved the profile filed by either company." Neither was there a patentee of the premises in controversy. The court said:

"It is urged by the appellee * * * that the acquisition of the right of way is entirely within the control of the corporation seeking it, irrespective of the approval or disapproval by the Secretary of the Interior of the profile or of the sufficiency of the articles of incorporation and proofs of organization."

After saying that the jurisdiction of the trial court to grant the relief prayed for depended upon the above contention, the court says:

"The objection to the jurisdiction rests upon the proposition that Congress has created a special tribunal for the decision of questions arising upon the administration of its public land laws and that this jurisdiction cannot be taken away from it by the courts."

After discussing the terms of the law, including the citation made by respondent, the court said:

"But there must be some instant of time at which legal title vests. *In construing the act we should note the significance of the expression 'thereafter' (that is after the approval of the profile by the Secretary and the noting of the same upon the plats in the land office) 'all such lands over which such right of way shall pass shall be disposed of sub-*

ject to such right of way.' This expression is by its implication inconsistent with the theory that the legal title has passed prior to action by the Secretary."

It will be observed that the court gives full credit to the language of the law fixing the time after which the lands will be disposed of subject to the right of way. By "the action of the Secretary" the court undoubtedly refers to the things required by law to be done in the land department and as against a patentee of the lands this would include the "noting" on the plats in the land office, otherwise those requirements of the law are nullified and we are confronted with the legal absurdity of an exparte and secret disposition of the public lands without the record showing the same being made up as required by law, which is to be held good as against a patent, regularly issued pursuant to "legal process" citing the holder of this "adverse" claim to appear.

For the purpose of the issues presented in the above cause it was sufficiently accurate for the court to say that "The legal title vests upon the approval of the profile by the Secretary of the Interior and not prior thereto." But the context not only shows that the court considered the noting on the plats in the local office a part of the necessary action of the department, but the issues in the case were materially different from the case at bar. Had either of the railroad litigants in that case, proved title as patentee, the other litigant would have been limited to showing reservations of its right of way in the patent or else claiming rescission of the patent on grounds of fraud.

In that case, the court expressly recognizes the jurisdiction of the land department to dispose of the land. We therefore assert that that decision sustains both of our leading contentions:

1. That the action of the land department in approving right of way includes necessarily the noting of such action on the public record.

2. That a claimant to right of way or depot grounds is an adverse claimant and where an entryman subsequently makes final proof, the department has jurisdiction to make a final disposition of the land which will be conclusive as against such adverse claimant who does not appear and have his rights protected in the patent.

Somewhat similar to the case last cited, is that of Chicago K. & N. Ry. v. Van Cleave, 33 Pacific 473, where the court said:

"We think the fourth section of the act above quoted clearly provides that the grant shall take effect only after the approval and *filing* of the map and profile, and that the words 'and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way,' clearly imply that lands disposed of prior thereto will not be subject to any burdens imposed thereon by said act." (Italics not in original.)

There is nothing in any of the cases to indicate that the mere signature of the Secretary is the time to which the word "thereafter" as used in the law, relates. Both of these cases indicate clearly that the entry on the records of the local office was regarded as a part of the things to be done before the lands were disposed of "subject" to the claim of the railroad, although that question was not directly in issue. Even then, the jurisdiction of the land office continued for the purpose of disposing of the lands, subject to such claims, and for the first time the entryman had an opportunity to invoke that jurisdiction for the protection of his claim.

Respondent quotes extensively from Cathcart v. Ry., 34 L. D. 619, and while the land department was not passing upon the questions in issue here, the case is both interesting and suggestive and supports in a general way our contentions.

Respondent constantly ignores the fact that had they presented their case in the land department, at the proper

time, and it had been allowed then, their claim to the use of the ground in controversy for the limited purposes named in the law, would have been indisputable; and, incidentally, it is very improbable that the ground would have been platted as Rowan's addition and sold to the appellant. They are seeking to ignore the fact that they have once had their day in court and by their default lost their claim, and also by their neglect involved the defendants in this controversy, that the laches and blame is entirely with the respondent.

In the above case, the record says that the amended map filed by the railroad company selecting the station grounds "was approved by the Secretary of the Interior, 'subject to all the *conditions, limitations* and *provisions* of the act of Congress of March 3, 1875, and the act of Congress of April 17, 1900, and *subject also to all valid existing rights.*' "

According to the respondent, the approval of the Secretary could not, under the law, be subject to anything. It was conclusive. Nothing additional could be done since the jurisdiction of the department was exhausted when the secretary wrote his name on the map. The rights of the entryman was by that act then and there adjudicated. He need never know even that he had lost. The railway need neither appear when notice of final proof was given nor prior thereto go into actual occupation of the premises. Although the law provides that the right of way for the roadbed shall be lost if the road is not constructed within five years, respondent would have us understand that when the Secretary writes his name on the map of the station grounds, an indefeasable title vests at that moment, even to the extent of a title in fee simple, as they allege in their complaint and were awarded in the decree.

In the foregoing case, the railroad was not contending with a patentee, but an entryman whose application for entry was not even accepted by the local office, and a townsite claimant, whose claim was several years subsequent to

that of the railroad and was protested by the railroad before it was allowed. No question was considered involving the notation of the claim on the record or the legal effect of final proof as against an adverse claim permitted to go by default in the land office. The railroad itself invoked the jurisdiction of the land department for the protection of its claim. *Respondents are here asserting that their claim required no such protection.*

Counsel have cited, at some length the case of Van Wyck vs. Knevals, but in that case the court was merely construing the language of a law which has scarcely a phrase in common with the law in this case. There the court determined *when* the line of route of road was to be regarded as *definitely fixed* under the terms of a special railroad grant. They held that this was the act of the railroad company itself. The law said the company should "file with the Secretary of the Interior, maps of its lines designating the route thereof" but gave the Secretary no discretion whatever, except to file the same. In that case Congress made a grant in praesenti and the court expressly holds that no act of the Secretary could affect or delay the carrying out of the act. They say that Congress itself has fixed the period when other parties than the grantee might acquire rights in the premises. We begin the following quotation at the exact point where the quotation given by respondent ceases:

"Its rights are not made dependent upon the issue of the Secretary's order, or upon notice of the withdrawal being given to the local officers. *Congress*, which possesses the absolute right of alienation of the public lands, has prescribed the period at which other parties than the grantee named, shall have the privilege of acquiring a right to portions of the land specified, and neither the Secretary nor any other officer of the land department, can extend the period by requiring something to be done subsequently, and

until done, continuing the right of parties to settle on the lands as previously. The language of the law in that case is as follows: (After the granting clause.)

"But in case it shall appear that the United States have, *when the line or route of said road is definitely fixed*, sold any section or any part thereof, granted as aforesaid," etc.

In the case at bar, there is no language of that character involved. The line or route of the road may be definitely fixed, located and constructed, and the company may not have acquired any claim to any definite tract of ground for depot purposes. Neither can it acquire any right of that kind without a definite segregation of some character.

In the case of Van Wyck v. Knevals, it seems the entryman actually acquired a patent, relying on the records. Yet he lost all. The act there construed was enacted in 1866. Is it not conceivable that when the act we are construing was enacted in 1875, Congress intended to enact a law under which such an injustice would be impossible. In any event, the construction we are placing on this law, permits no injustice to either party. We claim it is the duty of parties claiming through the land office, adversely to the regular entryman, under a law which provides that both claims shall exist at the same time, the one being subject to the other, to not only secure the proper official action of the department, which in this case includes the entry upon the record, but must also when cited as adverse claimants on final proof, appear and set up their claim. Failing to do so, if the land department has jurisdiction, the claim will be lost.

Respondent seeks to ignore the fact that it was a party to the final proof proceedings pursuant to which patent was awarded to Reed. The law requires that the applicant file with the register notice of his intention to make final proof, describing the land and that the register shall post and publish a notice thereof, all of which is proved by our patent. This is the positive requirement of the law itself. (Sec. 1.

Act March 3, 1879, page 299, Vol. 6, Fed. Statutes Annotated.)

The only important difference between the procedure for patenting mining claims and agricultural lands is that in the former the adverse claims are litigated in the courts prior to patent and in the latter they are heard and determined by the interior department. In both cases, notice of the application is giving by posting and publishing by the officers of the department and in both cases the proceedings for patent are suspended pending determination of adverse claims.

In the case of Wight vs. DuBois, 21 Fed. 694-5, referring to proceedings for mineral patent, Judge Brewer said:

"The proceedings before the land department are judicial or quasi judicial, at least. The publication is process. It brings all adverse claimants into court, and, failing to assert their claims, they stand, at the expiration of the notice, in default. True, no adverse claimant or supposed claimant may be named in the notice; no process may be served personally upon him; but that does not avoid the notice, or weaken its sufficiency to bring such party into court. This is not the only case known to the law in which parties not named in a notice are by it brought into court and their rights adjudicated. Unknown heirs are often thus brought in by a published notice. Tax proceedings, condemnations of rights of way, admiralty cases and many other present familiar illustrations. The sufficiency of the notice in these cases is unquestioned, even though the adverse claimant be not named, and no personal service be had. And if the parties be brought in, obviously it is that their claims be presented and determined.

"The succeeding section provides how such claims, if presented, shall be determined. Even without such section the purpose would be apparent. It would be grevious wrong to leave disputed claims unsettled, and when the owner of

lands making such general offer prescribes time, place, tribunal and manner of settling adverse claims, such provisions are a part and condition of the offer, and should be vigorously insisted upon by the courts.

"Conclusively assumed, any other rule would destroy the practical value of the provisions. If, notwithstanding his failure to adverse, a party may still present and litigate his rights, of what use to adverse? A failure to do so might give his adversary the advantage of a *prima facie* title, but the real question, the absolute rights, would remain undetermined. The applicant would hesitate to improve and develop his property because ignorant of what contests were before him, what claims might be presented. And the contestant might wait till the evidence in favor of the applicant's right had ceased to exist, or passed beyond his control, and then unexpectedly come forward with his claims. I do not mean that cases may not arise in which equity will interfere thereafter, if there be equitable grounds for interference, as where, by the acts of the applicants, those who might have adversed have been prevented, deceived or misled; but unless such equitable reasons exist, and none such appear in this case, he who fails to adverse until the expiration of publication is absolutely cut off, and cannot be heard to say that he has prior rights.

"These, in brief, are my views, and, without pursuing the discussion further, I sum up these propositions:

First, the government as a land owner, offers its land for sale upon certain prescribed conditions, compliance with which is a matter of settlement between the owner and purchaser alone, and with which no stranger to the title can interfere; second, publication of notice is process bringing all adverse claimants into court, and if no adverse claims are present it is conclusively presumed that none exist, and that no third parties have any rights or equities in the land."

CONCLUSION.

Respondent alone knew of the pendency of its application for depot grounds and failed and neglected to secure the notation upon the records. That application was purely an exparte proceedings and was only conclusive as between the railroad and the government. It was not conclusive as against any entryman of the premises—either present or prospective—and such claimant was entitled to invoke the jurisdiction of the land department for the establishment of his claim and the determination of all adverse claims, which jurisdiction is exclusive. Since the entryman could not even know of the existence of the claim of respondent until it was entered on the record, and no such entry ever having been made, respondent's claim has never, in fact, been so far consummated in the land department as to actually constitute a claim adverse to the entryman Reed. It is impossible for a claim to exist in such a manner—so that the entryman with the utmost diligence could not discover its existence. Such being the status of the claim in the land department, it can give the respondent no standing in this court as against a patentee whose patent stands unchallenged. Under an unbroken line of decisions, the title of Reed was quieted as against respondent by the proceedings for final proof and the issuance of patent thereunder. From an equitable standpoint, it is apparent that while the entryman Reed could only have learned of the existence of respondent's claim by accident, the respondent, on the other hand, was not only guilty of negligence in not prosecuting its application to the point of securing its entry on the proper records, but it was actually cited into court when Reed made final proof by notices which the courts hold constitute legal process, and permitted Reed to take patent by default. Respondent has actually permitted judgment against its claim by default in a court having jurisdiction and is now seeking

relief in a court having no jurisdiction of the case presented by the evidence.

We would respectfully ask the court to consider the exhaustive opinion given by Chief Justice Ailshie when the Idaho Supreme Court reversed itself on rehearing in this case, found on pages 392 to 403, 14th Idaho Reports, case entitled Oregon Short Line R. R. Co. vs. Stalker.

Respectfully submitted,

CARL A. DAVIS,

Attorney for Plaintiffs in Error.

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Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 225.

ALEXANDER R. STALKER and EMALINE STALKER,
Plaintiffs in Error,

vs.

OREGON SHORT LINE RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

BRIEF FOR DEFENDANT IN ERROR.

MAXWELL EVARTS,
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C. G. BURGOYNE, 72 to 78 Spring Street, New York.

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IN ERROR TO THE SUPREME COURT OF THE
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BRIEF FOR DEFENDANT IN ERROR.

Statement.

This is a controversy between the defendant in error claiming under an appropriation of land for station grounds under the Act of Congress of March 3, 1875 (printed in the appendix to this brief), and the plaintiffs in error claiming under a pre-emption entry. The decisions of the Idaho

Supreme Court herein are reported in 14 Idaho, 362, and 371.

Suit was brought by the Oregon Short Line Railroad Company, defendant in error, in the District Court of the Third Judicial District of Idaho, to quiet title to a tract of land, 410 feet by 1,304.2 feet in extent, situated in Ada County, Idaho, being a portion of the east half of the southwest quarter of section seven, township three north, range one east of Boise Meridian, particularly described in the complaint (Record, p. 3). The complaint alleges that the plaintiff (defendant in error) is the owner in fee and entitled to the exclusive possession of said tract, and that the defendants claim some adverse interest therein, and prays that the defendants be required to set forth the nature of their claims, that the title and right of possession of the plaintiff be adjudicated and that the defendants be enjoined from asserting any claim to said premises adverse to the plaintiff (pp. 3, 4). The defendants (plaintiffs in error) Alexander R. Stalker and Emaline Stalker, his wife, answered, claiming title in fee by intermediate conveyances from Joseph G. Reed, alleged to be the original patentee (pp. 4, 5). The remaining defendants failed to appear or answer and their default was en-

tered (p. 5). The District Court found that the Oregon Short Line Railroad Company (defendant in error) was a Utah corporation owning and operating a system of railroads through the State of Idaho and other States and was the owner and entitled to the exclusive possession of the tract in suit, and that the defendants (plaintiffs in error) had no estate, right, title or interest whatever therein (pp. 5, 6). Decree was entered accordingly July 23, 1906 (p. 7).

The facts were stipulated in substance as follows (pp. 8–11): The Idaho Central Railway Company was a Wyoming corporation, organized to construct and operate a line of railroad from Boise City, Idaho, to Nampa, Idaho. On July 1, 1887, it filed with the Secretary of the Interior a duly certified copy of its articles of incorporation and due proof of its organization, as required by law and in full compliance with the regulations of the Secretary of the Interior. On June 10, 1887, the Board of Directors of the Idaho Central Railway Company adopted a route for its said railroad and filed with the Register of the United States Land Office at Boise City a profile or map of alignment thereof. The said profile map was approved by the Secretary of the Interior February 17, 1888, and returned by

him to the said Land Office at Boise City. Thereafter said railroad was constructed on the route so adopted and was in operation on September 1, 1888. On September 12, 1888, said Idaho Central Railway Company filed in duplicate with the Register of said Land Office at Boise City a map showing the tract of land in suit, and claiming the same as station grounds for station buildings, turnouts, sidetracks, depot, and water station. This map was by the said Register transmitted to the Secretary of the Interior and filed in his office September 20, 1888, approved by the Secretary on December 15, 1888, and then returned to the Register of said Land Office. The Register and Receiver of the said Land Office at Boise City, upon the return of the said map of station grounds after its approval by the Secretary of the Interior, neglected to note the same upon the plats in the said Land Office and the same has never been noted upon said plats. The map itself has been missing from said Land Office since the commencement of this action. (It would appear from the Department regulations, page VII. of this brief, that the map returned by the Secretary to the local office was a copy of the Railway Company's map, and that the duplicate

original transmitted by the local office to the Department was retained there.) The Oregon Short Line Railroad Company (defendant in error) is the successor in interest of said Idaho Central Railway Company, owns and operates the aforesaid railroad from Nampa to Boise City, and owns all the right and title in and to the tract in suit acquired by the Idaho Central Railroad Company by reason of the facts aforesaid.

At all times prior to October 18, 1888, the east half of the southwest quarter and the west half of the southeast quarter of section seven, township three north, range one east of Boise Meridian were unoccupied and unclaimed public land of the United States, with the exception of such rights, if any, as the said Idaho Central Railway Company had acquired therein, and had been surveyed and opened to entry on July 1, 1875. On October 18, 1888, Joseph G. Reed filed upon said tract of land, constituting a quarter section, in the Land Office at Boise City his pre-emption entry, claiming residence established the same day. Thereafter, on April 24, 1889, he made final proof upon said tract, and patent issued to him therefor August 4, 1891. The said Reed, by warranty deed, conveyed to W. H. Rowan the land embraced in his pre-emption entry. (It is alleged in the answer,

page 4, that this conveyance by Reed to Rowan was prior to the issue of said patent and on or about July 27, 1889.) Thereafter said Rowan executed and filed with the County Recorder of Ada County, Idaho, a plat covering a portion of the land embraced in said pre-emption entry, including a portion of the tract claimed by the plaintiff (defendant in error) as station grounds, said plat being designated as Rowan's Addition to the Town of Meridian. (The answer alleges, p. 5, that the plat of Rowan's Addition was filed April 2, 1901). Thereafter Rowan conveyed to the plaintiffs in error lots 5, 6, 7 and 8 in Block 4 of said Rowan's Addition, all of which lots are embraced within the tract claimed by the plaintiff (defendant in error) as station grounds.

The original location of its road adopted by the Idaho Central Railway Company on June 10, 1887, as aforesaid, is identical with the present location of said railroad between Nampa and Boise City. Said route passes over and through the tract of land entered by Reed as aforesaid.

Alexander R. Stalker, one of the plaintiffs in error, testified that he first became acquainted with the land in controversy about seven years prior to the Spring of 1906; that during that time the railroad company had not been occupy-

ing or using land; that at the time he purchased his lots he had no knowledge that the property was claimed by the railroad company; that at the time he purchased his lots the railroad company was maintaining one side-track, a depot building and another small building upon its right of way adjacent to the tract of land claimed as station grounds; that the land in suit is situated in the town of Meridian, which is a town of about 700 or 800 inhabitants; and that when he purchased there were no buildings upon this tract (p. 12). It was admitted that Emaline Stalker had no other knowledge of these matters than her husband (p. 12).

The foregoing are in substance the only facts in evidence in this case. The brief for plaintiffs in error contains a number of statements, undoubtedly intended as conclusions which counsel for the plaintiffs in error considers may be legitimately drawn from the evidence, but for which there is no basis in the Record. It is stated, that, aside from the officials and the railway company no one knew of the neglect of the Boise Land Office officials to make a notation on their plats of the appropriation of the station grounds (Brief, p. 10); that a subsequent entryman of this land could not learn of this application even by the utmost diligence

(Brief, pp. 11, 33); that the respondent alone knew of the pendency of its application for depot grounds (Brief, p. 33); and that the respondent was "actually cited into court when Reed made final proof" (Brief, p. 33). We refer to these statements merely in order that the Court may not through inadvertence assume that they are facts established in the case.

Appeal was taken from the decree of the District Court to the Supreme Court of Idaho. An opinion was rendered May 15, 1907, directing that the judgment of the lower court be reversed. This opinion was written by Chief Justice AILSHIE, SULLIVAN, J., concurring, and appears on pages 18 to 21 of the Record.

A petition for rehearing was filed and granted (p. 16), and after reargument, a decree was entered February 27, 1908, overruling the former opinion of the Court and affirming the judgment of the District Court (p. 17). The opinion on rehearing (pp. 31 to 44) was written by SULLIVAN, J., STEWART, J., concurring. A dissenting opinion was rendered by Chief Justice AILSHIE (pp. 55 to 52).

To review the decree of the State Supreme Court affirming the decree of the District Court, the plaintiffs in error have sued out this writ of error.

ARGUMENT.

I.

The right of the defendant in error to assert its title is not barred by the issue of the patent or by the proceedings in the Land Department.

The plaintiffs in error contend that there was a failure on the part of the Idaho Central Railway Company (hereinafter designated as Railway Company), predecessor in interest of the defendant in error, to assert its claim to this tract for station grounds when Reed made final proof under his pre-emption entry, which bars this suit. It is not alleged in the answer or proved that the Railway Company did not appear in the proceedings upon Reed's final proof, or that any notice of such proceedings was given. The Act of March 3, 1879, Chapter 192 (20 Stat. at Large, 472), required that before final proof should be submitted by any person claiming under the pre-emption laws he should file with the Register of the proper land office a notice of his intention to make such proof, and that the Register should publish notice thereof for the time and in the manner specified in the statute. It is not pre-

tended that any actual notice of Reed's intention to submit final proof was given to the Railway Company, but it is contended that the subsequent issue of the patent is presumptive that the notice was published. The plaintiffs in error quote a number of decisions of the Department of the Interior as to the effect of the failure of an adverse claimant to appear in response to the statutory notice.

Assuming that notice by publication was given and that the Railway Company did not appear, even the decisions of the Department do not support the contention of plaintiffs in error. None of the decisions quoted has any application to the situation presented in the case at bar. The Department's view of the effect of such default is fully explained in *Randolph vs. Northern Pacific Railroad Co.* (9 Land Dec., 417), one of the cases cited in the brief of plaintiffs in error. In that case the Secretary said at page 417:

> "There can be no question that the Company, by failing to appear in answer to Randolph's notice, waived all right to deny the facts set up by Randolph's proof, or to protest against the legal implication of the record upon which the local office acted.

> * * * Not having appeared to oppose, the company, like any other regularly cited and defaulting party to a legal proceeding, must unquestionably stand upon the case as made. * * * If that case is one upon which the company has in law the better right, the judgment should go accordingly, notwithstanding the default."

It appeared in that case that Randolph had filed an entry upon land within the primary limits of the railroad company's land grant. The railroad company had failed to appear upon the final proof by the entryman. Nothing appeared, however, in the case made by the entryman to show that the land claimed by him was excepted from the railroad grant, and it appeared that his settlement had occurred after the railroad grant attached. It was accordingly held by the Secretary, that, notwithstanding the default of the railroad company to assert its rights, Randolph's claim should be disallowed.

The position of the defendant in error, by reason of its failure to appear upon the final proof in the pre-emption proceedings, can be no worse than if it had appeared and contested and its claim had been overruled by the Department. The findings and decisions of the Department

are not conclusive, even after the issue of patent, except upon questions of fact. The decision of the Department upon undisputed facts that one person is entitled to a patent is reviewable by the courts as a proposition of law.

In *Wisconsin Central Railroad Co. vs. Forsythe*, 159 U. S., 46, at page 61, this Court said :

> " But further, it is urged that this question of title has been determined in the Land Department adversely to the claim of the plaintiff. This is doubtless true, but it was so determined, not upon any question of fact, but upon a construction of the law; and such matter, as we have repeatedly held, is not concluded by the decision of the Land Department."

See also *Thayer vs. Spratt*, 189 U. S., 346, 350; *Greenameyer vs. Coate*, 212 U. S., 434, 445; *Whitcomb vs. White*, 214 U. S., 15.

The plaintiffs in error contend also that the patent issued to Reed in 1891 as the result of his preemption entry is conclusive and bars the assertion of title by the defendant in error in this suit. It is, however, a principle of law repeatedly announced by this Court that where lands have been previously disposed of, or appropriated, or reserved from sale or location, or other-

wise segregated from the public domain, the Department has no jurisdiction to transfer them and any attempted conveyance by patent is inoperative and void.

In *Davis's Administrator vs. Weibbold*, 139 U. S., 507, at page 529, the Court said:

> "We agree to all that is urged by counsel as to the conclusiveness of the patents of the land department when assailed collaterally in actions at law. We have had occasion to assert their unassailability in such cases in the strongest terms, both in *Smelting Co. v. Kemp*, 104 U. S., 636, 640–646, and in *Steel v. Smelting Co.*, 106 U. S., 447, 451, 452. They are conclusive in such actions of all matters of fact necessary to their issue, where the department had jurisdiction to act upon such matters, and to determine them; but if the lands patented were not at the time public property, having been previously disposed of, or no provision had been made for their sale, or other disposition, or they had been reserved from sale, the department *had no jurisdiction to transfer the land*, and their attempted conveyance by patent is inoperative and void, no matter with what seeming regularity the forms of law have been observed."

In *Hardin vs. Jordan*, 140 U. S., 371, at page 400, the Court said:

> "It is contended that by this decision the question became *res adjudicata*, and that Hardin and DeWitt and those claiming under them are bound thereby. It is very true that the decisions of the land department on matters of fact within its jurisdiction, made in due course of administration, cannot be called in question collaterally. But, as was declared in the recent case of *Davis vs. Wiebbold*, 139 U. S., 507, decided at the present term of this court, 'if the lands patented were not at the time public property, *having been previously disposed of*, or no provision had been made for their sale or other disposition, or they had been reserved from sale, the department had no jurisdiction to transfer the lands, and their attempted conveyance by patent is inoperative and void.' So that, if the lands had been 'previously disposed of,' the department has no jurisdiction over them; and the question whether they have, or have not, been previously disposed of is a judicial question, and not determinable by the executive department, except for the purpose of governing its own conduct in the administration of its functions."

See, also, *Burfenning vs. Chicago, St. Paul, etc., Ry.*, 163 U. S., 321, 323; *Johnson vs. Drew*, 171 U. S., 93, 99; *Wirth vs. Branson*, 98 U. S., 118; *Simmons vs. Wagner*, 101 U. S., 260.

There is in the present case no dispute as to the facts and it does not appear that there was, or could have been any controversy of fact before the land department in the Reed pre-emption proceeding. At most there is presented only the question of law as to whether the appropriation of station grounds made by the Railway Company was defeated in favor of a subsequent pre-emption entry because of the failure of the register of the local land office to note such appropriation of the station grounds on the plats in his office after the approval of the Secretary of the Interior of the appropriation map filed by the Railway Company. If our contention is sound that the title of the Railway Company was perfected, regardless of the subsequent notation on the plats of the local land office, it follows that the tract in suit had already lost its character as public land, by virtue of the Act of March 3, 1875, the filing of maps by the Railway Company and the approval thereof by the Secretary of the Interior. If the lands were not then a part of the public domain and subject to pre-

emption entry the Department was without jurisdiction to patent them to Reed. In the light of the cases above cited there is no obstacle to the determination by this Court of the question of law presented. The action of the Department of the Interior in patenting the land to Reed was either action entirely without jurisdiction because of the previous disposition of the land to the Railway Company, or was a determination by the Department of the question of law as to which party, the Railway Company or Reed, upon the undisputed facts was entitled to the land.

Furthermore, the issue of the patent to Reed is not at all inconsistent with the recognition by the Department and Reed at that time of the existing rights acquired by the Railway Company. The character of the title to station grounds acquired by a railroad company under the Act of March 3, 1875, has never been authoritatively determined, and the determination is not necessary in this case. On the assumption that the Act grants something less than a fee simple title and that a reversionary interest remains in the Government, it has been the practice of the Interior Department to patent tracts already subject to perfected right

of way and station grounds appropriations of railroad companies. This practice was expressed in the regulations of the Department of January 13, 1888 (12 Land Decisions, page 423, Appendix to this brief, p. VIII.), as follows:

> "All persons settling on public lands to which a railroad right of way has attached, take the same subject to such right of way and must pay for the full area of the subdivision entered, there being no authority to make a deduction in such cases."

See also Rule 2 of the regulations issued November 4, 1898 (27 Land Decisions, p. 664).

It appears that the earlier practice of the Department was to note upon the patent issued, and upon the preceding certificate of entry, an express reference to the rights of the railroad company, but this practice appears to have been abandoned at least as early as the regulations of November 4, 1898. See regulations of 1888 and 1898 above cited. But regardless of the regulations of the department in this respect any entry subsequently made and any patent subsequently issued are by the terms of the statute subject to the property rights theretofore acquired by a railroad company. The language of the statute is "and thereafter all such lands over which such

right of way shall pass shall be disposed of subject to such right of way". This is merely permission for a disposition of the reversionary interest of the Government subject to the existing rights of the railroad company. It does not read as a requirement or direction that patents shall expressly note the fact that the grant is subordinate to the title of the railroad company.

In *Rio Grande Western Ry. Co. vs. Stringham*, 110 Pac., 868 (not yet reported in Utah Reports) the Supreme Court of Utah says (p. 871):

> "Nor is it made to appear whether the mineral patent issued to Treweek in 1889 was in terms made subject to the right of way, but, since section 4 of the act provides that 'all such lands over which such right of way shall pass shall be disposed of subject to such right of way,' it again will be presumed, in the absence of a showing to the contrary, that the subsequent disposition made to Treweek was subject to the right of way, and in any event, since the title to the right of way vested in plaintiff's predecessor upon the Secretary's approval of the profile of its road, it matters not whether the subsequent grant to Treweek was or was not in terms made subject

thereto, for the law itself made it so. *Railroad Co. vs. Baldwin*, 103 U. S., 426, 26 L. Ed., 578; *Northern Pac. Ry. Co. v. Townsend*, 190 U. S., 267, 23 Sup. Ct., 671, 47 L. Ed., 1044. Therefore, the title which the respondents obtained from Treweek was subordinate to that of appellant's."

The pre-emption entry made by Reed covered a full quarter section or 160 acres. The station grounds claimed by the Railway Company covered only 12 and a fraction acres. It is stipulated that at the time of Reed's entry the railroad was actually constructed across the tract which he entered. There is no dispute that Reed took his patent to the 160 acres subject to the railroad right of way, whether or not his patent expressly mentioned the right of way. It is clear therefore that he did not consider the existence of the right of way a seriously objectionable burden upon his tract. There is no reason to assume that Reed did not know of the previous appropriation of 12 acres for station grounds. Nor is there reason to assume that the existence of such appropriation would have been an objection to him materially greater than the existence of the right of way. *It does not appear in evi-*

dence that Reed's patent did not expressly mention the right of way and station grounds. If any assumption is to be indulged, it might fairly be assumed that the part of the Reed tract of 160 acres not covered by the right of way and by the 12 acre station appropriation would receive an accession of value by reason of the proximity to the railroad and its station more than offsetting the actual loss of area from the tract by reason thereof, and that it was this very value of location which govered Reed's selection of this tract.

II.

The Railway Company did all it was required to do by the Act of Congress or regulations of the Department of the Interior to perfect its title and its rights were not prejudiced by the failure of the local land officer to note the appropriation of station grounds upon his office plats.

Reed, through whom plaintiffs in error claim, attempted to initiate a title by a pre-emption filing upon October 18, 1888. It is conceded that prior to that time, and while the lands were all public lands of the United States subject to

the operation of the general right of way act of March 3, 1875, the Railway Company, by the filing of its plats and the construction of its road, had fully and completely acquired a right of way 200 feet wide, the same being 100 feet on either side of the center line of its track. It is further conceded that at the time of Reed's filing the railroad was completed and was actually in operation. And it is further conceded that upon September 12, 1888, more than a month prior to Reed's entry, the Railway Company, having surveyed its station grounds and having adopted them, embracing the land in controversy in this suit, filed in the United States Land Office duplicate plats of said station grounds, and that one of these plats was in due course presented to the Secretary of the Interior and approved, and sent back to the land office for filing. The Railway Company, therefore, did all which was required of it, both by the act of March 3, 1875, and by the rules and regulations of the Department of the Interior, to acquire said station grounds.

It is now contended that because the officers of the local land office neglected to note the station grounds upon the land office plat book the Railway Company acquired nothing, or forfeited

what it had acquired. It is not said that the Railway Company was at fault in any particular, unless it was its duty in some way to compel the officers of the local Land Office at Boise to do their duty and make notations upon the plats in that office.

The right of way and station grounds involved were acquired from the United States under the provision of the Act of Congress of March 3, 1875, Chap. 152 (18 Statutes at Large, 482). In this Act there is no provision or requirement relative to maps covering station grounds. The only requirement with regard to maps or plats is found in Section 4 of this Act, and it is there provided that the railroad company shall "file with the Register of the Land Office for the district where such land is located a profile of its road." The word "profile" as used in Section 4 is clearly intended to mean nothing more than a map of alignment, that is, a map showing the center line of the road as projected, and such has been the construction always placed upon the law in that respect by the Department of the Interior.

After careful search we have been unable to find any authority announcing the doctrine that by virtue of the statute itself a railroad company

must file a map of its station grounds. It, therefore, appears that the requirement as to the filing of maps of station grounds is merely a regulation of the Department of the Interior. We concede, however, that the Secretary of the Interior was entirely within his rights in making proper regulations for the identification of station grounds (*Williamson vs. United States*, 207 U. S., 425, 462), but it certainly cannot be assumed or said that the provisions of Section 4 of this Act apply to the selection of station grounds. It no doubt would be proper to say that a railroad company desiring to acquire title to station grounds under this Act must comply with such reasonable rules and regulations as may be made by the Secretary of the Interior, who in accordance with the general rule of the Department requires station grounds maps to be filed in his office and approved. The maps were filed and were approved by the Secretary as required by this regulation.

There is not now, nor has there been at any time a rule of the Department of the Interior whereby it is made the duty of a railroad company to see to it that notations are made upon any plat in the office of the Register of the Local Land

Office, or at any other place, and even if we should concede for the sake of the argument that in the case of a right of way it is necessary to have this notation made upon the plats for the reason that it is a statutory requirement, it would not by any means follow from such concession that a notation would have to be made on plats in the Local Land Office in a case where station grounds were selected. The failure to make a notation upon the plats was nothing more or less than a failure of the local land officers to keep a proper record in their office, and such failure can have no other effect than their failure to keep a record in any case would have. If it is true that a person investigating the records of the Land Office at Boise could not, in the absence of such notation, ascertain therefrom the limit or extent of the railroad station grounds at Meridian, this fact could not in any manner place in jeopardy the rights of the defendant-in-error for the reason, first, that its predecessor was not bound either by the law or any rule of the Department to see to it that any notation was made upon these plats, or that any record whatever was made of its right in and to these station grounds.

In the orderly procedure of the Land Office no doubt it was the duty of the Register to make some notation of entries upon the public lands whereby others might be informed as to the rights appropriated and already existing, but their failure to do so cannot work to the injury of those who have filed such entries and appropriations. The Department of the Interior by repeated rulings has established this proposition.

In the case of *Goist vs. Bottum*, 5 L. D., 643, the Secretary of the Interior, in discussing a kindred question, uses the following language:

> "Both parties throughout seem to have acted in entire good faith, and done that which the law required in order to secure title to the desired land. The whole difficulty has arisen from the failure of the local officers to keep their records properly posted.

And at page 646:

> "It follows naturally from this premise that the failure of the local officers to have noted upon the proper records of their office his claim against said tract cannot be permitted to work to his prejudice inasmuch as he has done all the law required of him, and the officers alone are derelict in this duty."

Again we call the Court's attention to the language used by the Hon. Secretary Teller in the *Matter of Edward R. Chase*, 1 L. D., 111:

> " Thus it appears in the light of the foregoing precis of the history of this case that Chase's application in question was regularly and properly made at a time when the tract applied for was vacant public land, and therefore subject to such entry. The failure or refusal of the Register and Receiver to accept and properly note upon their office records his original application and amendment of the same could not jeopard his rights in the premises."

The Department of the Interior has always consistently held to this rule, and the cases decided holding to this principle are very numerous. Among them we call the attention of the Court to the cases of:

Pomeroy vs. Wright, 2 L. D., 164.
Cole vs. Markley, 2 L. D., 847.
Postle vs. Strickler, 3 L. D., 42.
Hawkins vs. Lamm, 9 L. D., 18.
Edward Young, 9 L. D., 32.
Baird vs. Chapman, 10 L. D., 210.
Richardson vs. Moore, 10 L. D., 415.
Yates vs. Glafcke, 10 L. D., 673.
Linville vs. Clearwaters, 11 L. D., 356.

This being merely a regulation of the Department of the Interior, certainly the law as laid down by the Department of the Interior should govern.

This law, however, is not only the law as construed by the Land Department, but is the law as laid down by this Court. In *Van Wyck vs. Knevals* 106 U. S., 360, in considering a land grant which expressly required the Secretary of the Interior to withdraw lands from entry upon the definite location of the railroad, this Court said, at page 366:

> "The inquiry then arises, when is the route of the road to be considered as 'definitely fixed' so that the grant attaches to the adjoining sections? The complainant in the court below, who derives his title from the company, contends that the route is definitely fixed, within the meaning of the Act of Congress, when the company files with the Secretary of the Interior a map of its lines, approved by its directors, designating the route of the proposed road. On the other hand, the defendant,—the appellant here,—who acquired his interest by a subsequent entry of the lands and a patent therefor, contends that the route cannot be deemed definitely fixed, so that the grant at-

taches to any particular sections and cuts off the right of entry thereof until the lands are withdrawn from market by order of the Secretary of the Interior, and notice of the order of withdrawal is communicated to the local land-officers in the districts in which the lands are situated. We are of opinion that the position of the complainant is the correct one. The route must be considered as 'definitely fixed' when it has ceased to be the subject of change at the volition of the company. Until the map is filed with the Secretary of the Interior the company is at liberty to adopt such a route as it may deem best, after an examination of the ground has disclosed the feasibility and advantages of different lines. But when a route is adopted by the company and a map designating it is filed with the Secretary of the Interior, and *accepted by that officer*, the route is established; it is, in the language of the act, 'definitely fixed,' and cannot be the subject of future change, so as to affect the grant, except upon legislative consent. *No further action is required of the company to establish the route.* It then becomes the duty of the Secretary to withdraw the lands granted from market. *But if he should neglect this duty, the neglect would not impair the rights of*

the company, however prejudicial it might prove to others."

In the case of *Lytle et al. vs. State of Arkansas et al.*, 9 How., 314, this Court lays down the general rule governing this question in the following language (p. 333):

> "It is a well established principle that where an individual in the prosecution of a right does everything which the law requires him to do, and he fails to attain his right by the misconduct or neglect of a public officer, the law will protect him."

The only map required is the map prescribed by the regulations of the Department of the Interior, and those regulations nowhere provide that the railroad company shall make any record of any of these maps or of any paper showing its station grounds. After the railroad company has filed its map with the local officers its duty ends. It is the duty of the local officers to forward the map to the Secretary of the Interior. In approving or rejecting it the Secretary acts in a judicial capacity, and after he has acted in such capacity, and approved the map, the title of the company is complete. As to what shall be done with the map after approval, and as to what record shall be kept of it,

that is a matter solely for the Secretary of the Interior. The law says nothing whatever about a record, and that matter being entirely optional with the Secretary, certainly the railroad company would be unable to force him to keep a record showing station grounds. If the railroad company went into court for such purpose it would be entirely without standing and its application would be without merit.

The rule announced by this Court is that when a person has done all that the law requires of him in order to initiate and perfect his right to a portion of the public domain, his right cannot be defeated on account of the neglect of a public officer. It must necessarily follow from this proposition that the right acquired by the Railway Company was as extensive as it would have been had the local land officers at Boise properly kept the records in their office. If they had properly kept the record in their office, certainly the Railway Company would have been under no obligation to pay any attention whatever to the proceedings subsequently instituted by Reed to obtain a patent to this tract of land, and any patent which he might obtain could not in any way interfere with the Railway Company's right. Therefore, the conclusion from

the whole argument comes to this : that the Railway Company had perfected its rights prior to the time that Reed initiated his rights, and, that being true, the subsequent patent to Reed was void in so far as it interfered with the rights of the Railway Company.

Counsel for plaintiffs in error states in his brief (p. 10) :

> " The railway company sought to secure the benefit of this law, a gift pure and simple."

We observe that the grant to the Railway Company was no more a gift than the grant to Reed, indeed the conditions exacted of the Railway Company were much more burdensome, proportionately, than the conditions exacted of Reed. About six months after the application, upon the payment of a nominal sum of money, Reed procured title to his land, a very simple process. His lands were made valuable largely by reason of the construction of the railroad. The railroad was constructed at great expense, which expense was made necessary in order to procure a comparatively small amount of land, which it could not speculate in, but could only use for railroad purposes—purposes quasi-public in their nature.

III.

The regulation of the Secretary of the Interior requiring a notation upon the plats in the land office does not have the force or effect of a recording act.

In the brief of plaintiffs in error it seems to be assumed that a notation upon the plats in the local land office had the force and effect of a statute requiring a party to place an instrument of record in order to give notice to subsequent purchasers and incumbrancers.

The various requirements of statutes requiring records of instruments affecting title to real property are contrary to the rule of common law, and unless there is some specific statute requiring a record of an instrument, no such record is necessary. That in the case of a right of way the statutory provisions were not intended to serve the purposes of a recording act, but as a means of fixing a floating grant, is clear from the construction placed upon this act in numerous cases decided by this Court. It is established that this statute is an offer to all railroad companies and takes effect as a grant to any particular company when such company complies with the provisions of the act by locating its

road and filing copy of its Articles of Incorporation, due proofs of its organization and a profile of its road in the Land Office. This rule, however, is subject to the qualification that the grant becomes fixed definitely by actual construction of the road before the filing of the profile thereof. We submit that under this construction of this act it is very clear that Section 4 was not intended as a recording act, and cannot have that force or effect.

In the case of railroad land grants this Court has repeatedly and consistently held to the doctrine of "relation back to the date of the grant."

These land grant statutes do not contemplate a record in the Land Office until the maps of definite location are approved, and yet intervening settlers acquire no rights notwithstanding the absence of a record.

Railroad Co. vs. Baldwin, 103 U. S., 426.

Bybee vs. Railroad Co., 139 U. S., 663.

Railroad Co. vs. Ely, 197 U. S., 1.

Railroad Co. vs. Hasse, 197 U. S., 9.

Under the Act of March 3, 1875, it appears clearly that the date of the grant is the time of

the filing of the maps in the local Land Office, and after that time the rights of the company will take precedence over the rights of settlers. The provision in this Act, for notation of the right of way on the public land plats is a provision which cannot be complied with until the maps have been approved by the Secretary. So that it cannot have been intended to serve as notice to settlers between the time of filing the right of way map and its approval. It is worthy of note in this connection that Reed's preemption entry was made before the map was approved and returned by the Secretary, so that even if the local officer had duly noted the station grounds appropriation upon his plats, such notation would have served no useful purpose so far as Reed was concerned, and he was not prejudiced by its omission.

Another thing is to be noted, and that is that after the maps are filed in the local Land Office for transmission to the Secretary of the Interior, the railroad company entirely loses control over them. The Secretary of the Interior has a right to hold the map transmitted to him for such length of time as he may reasonably choose, and after he approves it it is not returned to the company, but is returned to the local office where

originally filed. Therefore, the company is entirely without redress if this act should be construed as a recording act, and one which compels the company to see to it that the necessary record is made.

The recording acts usually provide that a party shall record his instrument, and in some courts this provision has been construed to make the recording officer the agent of the party who is seeking to have the instrument recorded. Such a provision of the law is, however, entirely dissimilar from the provision in question for the reason that the act in question provides that the company shall deliver the maps after they are prepared to the Register of the Land Office in the district in which the land is situate for transmission to the Secretary of the Interior. That is the only thing required of the company. The law does not say that after this map is approved by the Secretary of the Interior, the company shall deliver it to the Register and Receiver and have it recorded, or have notations made upon the plats in the office of the Register and Receiver, but that act, if it is to be done at all, must be done by the Register and Receiver

under the direction of the Secretary of the Interior.

In the case of station grounds there is no statutory requirement whatever as to notations to be made upon the plats in the local office, the only requirement in this respect being a regulation of the Secretary of the Interior; and if he has made a regulation that when he has approved the map there should be made under his direction in the office of the Register of the Land Office a notation upon the plats, that is a record depending entirely upon such regulation, not necessary under the law, and a record over which the plaintiff has no control.

If, however, the Court should assume that the regulation of the Department as to the notation of appropriations of station grounds has the effect of a recording act, we submit that under a statute of this kind the great weight of authority seems to be in accordance with the rule announced by the Idaho Supreme Court in this case, that when a grantee has duly deposited for record a valid instrument at the proper time, in the proper office and with the proper officer, he has performed his whole duty, and subsequent purchasers will be charged with constructive notice notwithstanding the officer

does not properly spread the instrument on the record book, or fails to record it at all.

Steam Stone-Cutter Co. vs. Sears, 23 Fed. Rep., 314.
Hudson vs. Randolph, 66 Fed. Rep., 216.
Seibold vs. Rogers, 110 Ala., 438.
Oats vs. Walls, 28 Ark., 244.
Lewis vs. Hinman, 56 Conn., 55.
Kisur vs. Heuston, 38 Ill., 252.
Hayden vs. Pierce, 165 Mass., 359.
Deming vs. Miles, 35 Neb., 739.
Farabee vs. McKerrihan, 172 Pa. St., 234.
Nichols vs. Reynolds, 1 R. I., 30.
Mangold vs. Barlow, 61 Miss., 593.
Armstrong vs. Austin, 45 S. C., 69.

IV.

Upon approval of the map by the Secretary of the Interior, the title of the Railway Company was perfect and related back to the date on which the map was filed.

The Act of March 3, 1875, prescribed definitely the method to be pursued in perfecting title to right of way, but contains no require-

ment of the filing of maps or anything else in connection with station grounds. The Justices of the State Court in this case unanimously concur in this respect. The language of the Act is that "the right of way through the public lands of the United States *is hereby granted.* * * * also ground adjacent to such right of way for station buildings, depots, machine shops, side-tracks, turnouts and water stations, not to exceed in amount twenty acres for each station. * * *." This is a grant *in præsenti* of lands to be thereafter identified, to any railroad company which has qualified itself as grantee by filing its articles of incorporation and proofs of organization. The lands are identified, as far as the right of way is concerned, by the construction of the road or by the filing of the profile map, and the grant thereupon becomes perfect.

Noble vs. Railroad Co., 147 U. S., 165, 176.

Jamestown, etc., Railroad Co. vs. Jones, 177 U. S., 125.

Undoubtedly in the absence of any provision in the statute as to how the grant of station grounds shall be identified, the Secretary of the Interior could impose the requirement of the filing of a map of station grounds for the pur-

pose of such identification, and this regulation may be considered read into the Statute as a condition of the grant of station grounds.

True, the regulations contemplate an approval by the Secretary of the station ground map, and the statute requires such approval of the right of way map. When such approval is given, however, the title of the railroad company, which is thereby perfected, relates back to the date of filing of the map identifying and definitely locating the grant to it. It would be intolerable if rights of settlers subsequent to the filing of the map could be given precedence by the delay incident to the Secretary's approval.

Weyerhaeuser vs. Hoyt, 219 U. S., 380, 387.

This proposition appears to have been long settled in the Land Department.

Railroad Co. vs. Downey, 8 L. D., 115, 119:

> "It seems to me clear that the purpose of Congress in this 4th Section was only to provide means by which railroads could define, or definitely to locate, the right of way, of two hundred feet in width, with station grounds, etc., desired for the road which was to be thereafter constructed; and that,

as in the case of other grants, or 'floats,' the right of the grantee, in its relation to settlers on public lands attached from the date of filing the map of definite location."

St. P., Minn. & Man. Ry. Company, 26 L. D., 181:

"Where a company has complied with the law by filing its articles of incorporation and due proofs of organization, it is clearly entitled to a grant of the right of way over the public lands under the Act of March 3, 1875 (*supra*). To secure this right, however, it must file maps of the location of its road, and plats of necessary station grounds. It is true, the law makes the maps and plats filed by the companies subject to approval by the Secretary of the Interior, and it would seem that, until approved, no right is vested in the company thereunder.

"After filing the maps and plats as required by statute the company has done every act necessary to be performed on its part.

"Much time must necessarily elapse before these maps can go through the regular course of examination and be presented to the Secretary of the Interior for his approval.

> "Is the company's right in jeopardy, although it may be in the actual use of the land, during this period, and can its right be made to depend upon the action of others, as would be the result of your office decision? It is not believed that such was the intention of Congress, but rather that in determining whether a map should be approved the condition existing at the time of its filing must control."

The same ruling was made by Secretary Hitchcock in the case of *Hamilton Pope*, 28 L. D., 402.

The counsel for plaintiffs in error and the Chief Justice of the Court below appear to believe that no rights to station grounds could be acquired except by actual occupation, or in any event that in some way the long continued failure to occupy the station site selected forfeits the appropriation.

There is no warrant in the statute for such contentions. If a company could acquire station grounds under the Act only by actual occupation the purposes of the grant could always be defeated by settlers who desired to take advantage of the benefits to accrue to them from settlement adjacent to the railroad, for such settlement would be invited immediately by the filing of the

right of way profile by any railroad company. There is no danger of a fraud on the government or the public resulting from the indefiniteness of the Act concerning the period for which an appropriation for station grounds may continue without actual occupation. The government can enforce any forfeiture to which it is entited on this account.

In the late case of *Cathcart et al. vs. Minnesota & Manitoba Railway Company*, 34 L. D., 619, 625, Mr. Secretary Hitchcock uses the following language:

> "If it were held that under the terms of the grant, the railroad company would be required to show that lots 3 and 4 were needed for terminal purposes, *it would seem that the approval of the map of definite location of the right of way and station grounds and selection of said lots was an adjudication by the Secretary of the Interior that the same were needed for such purposes.* And while it does not appear that said lots, outside of the right of way and station grounds, have as yet been used by the company in the construction, maintenance, and operation of its road, testimony was submitted to the effect that it was and still is the intention of the company to use the

same for terminal purposes. If there was any part of lots 3 and 4 left to which Cathcart's right under this settlement could attach, after the appropriation by the railroad company for its right of way and station grounds and the forty acres to which it was entitled under its grant, he might be allowed to make entry of said lots, subject to the company's rights to the portion claimed by it under its grant, but said company's rights appear to cover the entire lots. In view of the situation in this case it would not seem to make any difference whether the grant in question to the railroad company be held to convey a base fee or merely an easement. Under the decision of the Court in the case of *Northern Pacific Railroad Company vs. Smith* (*supra*), until a forfeiture has been declared for mis-user or non-user, said lots cannot be entered by Cathcart, and such forfeiture could not be enforced in a private action.

"*As to the townsite applicants it appears that the rights of the railroad company under its grant attached on July 13, 1900, upon the filing of its map of definite location of right of way and station grounds*, and appropriation of lots 3 and 4, and that the road was constructed through said lands long prior to the passage of the act extend-

> ing the townsite laws to lands within said reservation. Most of the townsite settlers came upon the land subsequently to the completion of the road or with the knowledge of its intended construction. It was held in the case of *Link vs. Union Pacific Railroad Company* (6 L. D., 322), that 'the construction and operation of a railroad is sufficient to put subsequent settlers within the limits of the grant on inquiry as to the rights of the road, and parties claiming adversely thereto' ".
>
> See, also, *Northern Pacific Railroad Co. vs. Smith*, 171 U. S., 260 (43 L. Ed., 157).

This grant having attached at the time of the filing of the map, and the rights thereunder having been adjudicated in favor of the Railway Company by the Secretary of the Interior by his approval of the map, and the road having been constructed, may we ask when our rights were lost or forfeited? The government has never complained. Necessarily, therefore, any subsequent right granted by the government to these lands must be subject to the right of way and station grounds theretofore granted. Certainly a third party whose rights subsequently attached is not in position to insist upon the

United States declaring a forfeiture on account of the neglect of its own officers.

The question of forfeiture cannot under any theory enter into this case for the reason that under the repeated rulings of the Land Department, and under the repeated decisions of this Court, the only person who is in a position to take advantage of the forfeiture is the United States Government, and of course under the facts as presented in this case it would be absurd to say that the United States could enforce a forfeiture on account of the failure of the Register of the local Land Office at Boise to make proper notation upon his plats.

V.

It is not pleaded or proved that the plaintiffs-in-error or their predecessors in interest were bona fide purchasers.

It is incredible that Reed did not know of the appropriation by the Railway Company of this tract of land for station purposes. His entry was made during the next month after the Railway Company's plats were filed. So far as the record shows, at all times prior to the patent of

the Reed land, and at all times until the commencement of this suit, these station maps, or at least one of them, was on file in the local office. If Reed inquired as to the extent of the Railway Company's rights, as he doubtless would do, the local land officials would call his attention to the map as the definition of the Railway Company's claims. If the regulations of the Department were observed the patent issued to Reed expressly reserved the right of way and station grounds of the Railway Company. The fact doubtless is that Reed not only knew of the location of the station grounds, but would not have entered the land if the station had not been located there. He made his entry because the Railway Company had selected the tract in question as its station grounds. That part of his entry which was left to him was much more valuable and is still much more valuable than it would have been if the Railway Company had not located its station at that point.

If the matter of notice had been made an issue by the pleadings in this case it doubtless would have been possible to show by irrefutable proof that when the townsite of Meridian was originally laid out upon the entry of Reed and others

the tract of land claimed by the Railway Company as station grounds was excluded because it was known to be and recognized as railroad ground; but no issue of the lack of notice was ever tendered by the pleadings.

There is absolutely no allegation in the answer either directly or indirectly stating that the plaintiffs in error, or any of their predecessors in interest, were innocent purchasers of this property. There is no allegation that any of them were unfamiliar with the claims of the Railway Company. There is no allegation that any of them were in any way misled, or that they were purchasers for value. There is no allegation, and no attempt to prove, that plaintiffs in error were not put upon inquiry as to the possession and ownership of this land.

The rule of the law in this regard is well stated in the case of *Eversdon vs. Mayhew*, 65 Cal., 163, 167, as follows:

> "To entitle a party to protection as such a purchaser he must aver and prove the possession of his grantor, the purchase of the premises, the payment of the purchase money in good faith, and without notice, actual or constructive, prior to and down to the time of its payment."

See also:

Boone vs. Chiles, 10 Peters, 211.

Smith vs. Orton, 131 U. S., Appendix, at p. 78.

McDonald vs. Belding, 145 U. S., 492, 498.

Johnson vs. Georgia Loan & Trust Co., 141 Fed., 593; 72 C. C. A, 639.

Trice vs. Comstock, 121 Fed., 620; 57 C. C. A., 646.

Stalker testified that at the time he purchased the lots in question he had no knowledge that the property was claimed by the plaintiff. This evidence did not respond to any allegation and was improperly admitted for the reason that no defense of estoppel or want of notice was pleaded. And there was no proof or offer of proof that the plaintiffs in error parted with any valuable consideration upon the conveyance to them.

It appears from the record that Reed entered the tract of land embracing the station grounds October 18, 1888, and patent was not issued until August 4, 1891. In the meantime, on July 27, 1889, before patent issued, he conveyed to the defendant W. H. Rowan. It was very clearly a speculative entry on the part of Reed.

He entered the land because the Railway Company had established a station at that point and the adjacent land would become valuable.

There is no allegation or proof that either Reed or Rowan were not fully advised as to the rights and claims of the Railway Company; the inference is that they were advised.

There is no evidence of any possession or occupation of this station ground tract by any one. Rowan filed a plat of it as an addition to the Town of Meridian in 1901, but nothing further appears. It is incredible that Rowan, if he believed that he had absolute title in fee simple to this ground, with exclusive right of possession thereof, never took possession, and did not undertake to exercise any dominion thereover until the year 1901.

There was no dividing line between the right of way proper and the station grounds; together they formed a single tract. Is it conceivable that, notwithstanding the fact that to their knowledge this tract of land continued for many years to be unoccupied and was adjacent to and not separated by any line of demarkation from what they concede to be railroad property, the plaintiffs in error and their predecessors made no inquiry whatever of the Company or its agents as to what it claimed.

Conclusion.

The decree in this case should be affirmed.

Respectfully submitted,

MAXWELL EVARTS,
P. L. WILLIAMS,
Of Counsel for Defendant in Error.

APPENDIX.

AN ACT granting to railroads the right of way through the public lands of the United States (18 U. S. Stat., 482).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station-buildings, depots, machine-shops, side-tracks, turn-outs, and water-stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.

SEC. 2. That any railroad company whose right of way, or whose track or roadbed upon such right of way, passes through any canyon, pass or defile, shall not prevent any other railroad company from the use and occupancy of the said canyon, pass, or defile, for the purposes of its road, in common with the road first located, or the crossing of other railroads at grade. And the location of such right of way through any canyon, pass or defile shall not cause the disuse of any wagon or other public highway now located therein, nor prevent the location through the same of any such wagon road or highway where such road or highway may be necessary for the public accommodation; and where any change in the location of such wagon road is necessary to permit the passage of such railroad through any canyon, pass or defile said railroad company shall before entering upon the ground occupied by such wagon road, cause the same to be reconstructed at its own expense in the most favorable location and in as perfect a manner as the original road: *Provided*, That such expenses shall be equitably divided between any number of railroad companies, occupying and using the same canyon, pass or defile.

SEC. 3. That the Legislature of the proper

Territory may provide for the manner in which private lands and possessory claims on the public lands of the United States may be condemned; and where such provision shall not have been made, such condemnation may be made in accordance with section three of the act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes, approved July first, eighteen hundred and sixty-two", approved July second, eighteen hundred and sixty-four.

SEC. 4. That any railroad company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: *Provided*,

That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road.

SEC. 5. That this act shall not apply to any lands within the limits of any military park or Indian reservation or other lands specially reserved from sale, unless such right of way shall be provided for by treaty-stipulation or by act of Congress heretofore passed.

SEC. 6. That Congress hereby reserves the right at any time to alter, amend or repeal this act, or any part thereof.

Approved, March 3d, 1875.

Circular—Right of Way—Railroads—Act of March 3, 1875.

The following is a copy of an act of Congress approved March 3, 1875, granting to railroads the right of way through the public lands of the United States:

[Here follows the act which is set out on p. 1 of this Appendix.]

The regulations under the law are as follows:

I. Any railroad company desiring to obtain the benefits of the law is required to file—

> [Here follows the requirement as to filing copy of articles of incorporation, due proofs of organization, etc., not here important.]

II. Upon the location of any section of the line of route of its road, not exceeding 20 miles in length, the company must file with the register of the land district in which such section of the road, or the greater part thereof, is located, a map, for the approval of the Secretary of the Interior, showing the termini of such portion of the road, its length, and its route over the public lands according to the public surveys.

The map must be filed within twelve months after the location of such portion of the road, if located upon surveyed lands, and if upon unsurveyed lands, within twelve months of the survey thereof. It must bear—

[Here follows description of the affidavit and certificate required, not here important.]

III. It will be observed that the requirements of the law regarding the filing of the proper papers and maps are conditions precedent to the

obtainment of the right to construct a railroad over the public lands, or to take therefrom material, earth, stone and timber for its construction, or to occupy them for station or other purposes. It is, therefore, imperative that proper steps, as pointed out in this circular, should be taken by a company, and the approval of the Secretary of the Interior obtained, prior to the construction of any part of its road or its occupancy of the public lands in any manner.

* * * * *

VI. If the company desires to avail itself of the provisions of the law, which grant the use of "ground adjacent to the right of way for station buildings, depots, machine shops, side tracks, turnouts and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road," it must file for approval, in each separate instance, a plat showing, in connection with the public surveys, the surveyed limits and area of the grounds desired. Such plat must bear—

[Here follows description of affidavit and certificates required, not here important.]

The right of a railroad company does not attach until its map or maps of definite location

have been approved by the Secretary of the Interior and a copy transmitted to the district land office within which the line of road is situated.

When maps of a line of any road have been approved by the Secretary of the Interior a copy of so much thereof as relates to the lands within the boundaries of a given district will be transmitted to the register and receiver.

Immediately upon receipt of such copy, if the same represents surveyed lands, the local officers will mark upon the township plats the line of route of the road as laid down on the map. They will also note, in pencil, on the tract-books opposite each tract of public land cut by said line, that the same is to be disposed of subject to the right of way for the road, giving its name. Thereafter in disposing of any tract cut by the line of route, the claim to which shall have been initiated subsequent to the receipt of the copy of the approved map, the register and receiver will note, in red ink, across the face of the certificate issued upon any entry made, that the same is allowed subject to the right of way of the road, giving its name, and refer to the letter from this office transmitting the map by its initial and date.

When there is received from this office a copy of an approved plat of grounds selected by a company, under the act in question, for station purposes, etc., they will mark the proper township plat accordingly, make the necessary notes on the tract books, and in disposing of the tracts which may include the grounds so selected the officers will note on the certificate of entry, in addition to the note concerning the right of way, the entry is permitted subject to the use and occupation of the company (naming it) for station purposes, etc.

When copies of approved maps or plats are sent, showing lines of route through unsurveyed lands, they will be placed on file, awaiting further compliance with the law and instructions by the companies after survey of the lands.

The act of March 3, 1875, is not in the nature of a grant of lands; it does not convey an estate in fee, either in the "right of way" or the grounds selected for depot purposes. It is a right of use only, the title still remaining in the United States.

* * * * *

All persons settling on public lands to which a railroad right of way has attached, take the same subject to such right of way and must pay

for the full area of the subdivision entered, there being no authority to make deductions in such cases.

* * * * *

Very respectively,

S. M. STOCKSLAGER,

Acting Commissioner.

Department of the Interior,

January 13, 1888.

Approved.

H. L. MULDROW,

Acting Secretary.

(*12 L. D. 423–429.*)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 225.

ALEXANDER R. STALKER ET AL., PLAINTIFFS IN ERROR,

vs.

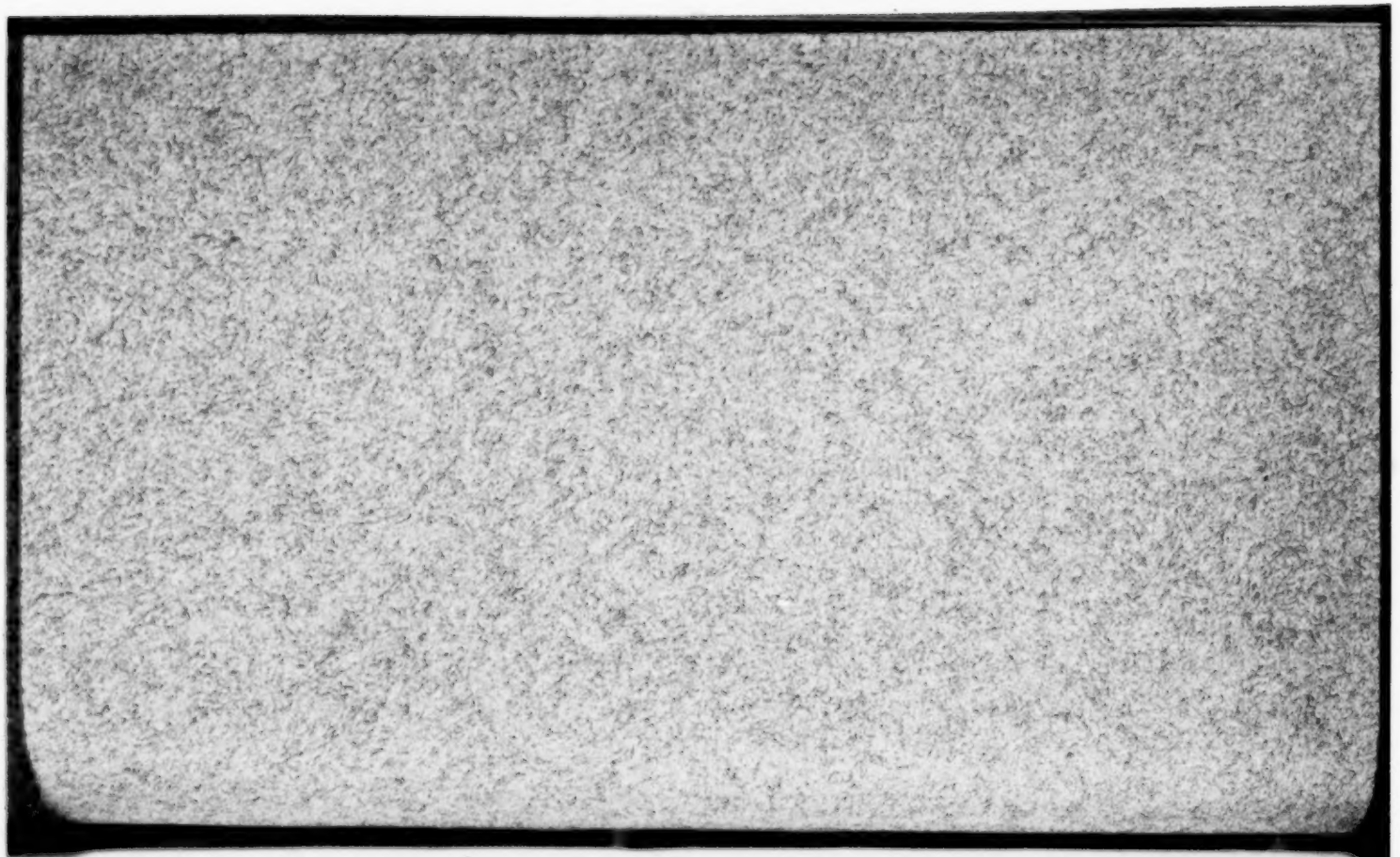
OREGON SHORT LINE RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

MEMORANDA

For Argument on Behalf of Defendant in Error.

MAXWELL EVARTS,
A. A. HOEHLING, JR.,
For Defendant in Error.



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vs.

OREGON SHORT LINE RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

MEMORANDA

For Argument on Behalf of Defendant in Error.

Statement of Case.

This action was the ordinary one brought by the railroad company, under the statutes of the State of Idaho, to quiet title, and is based upon the following facts, as developed by the pleadings, stipulations, and proofs:

The Idaho Central Railway Company (to whose rights defendant in error, Oregon Short Line R. R. Co., has succeeded, R., 8), having been organized to construct and operate a line of railroad from Boise City to Nampa, in Idaho, on July 21, 1887, made due compliance with the requirements of what is known as the general railroad right-of-way act of March 3, 1875 (18 Stats., 482), and with the rules and regulations promulgated thereunder by the Department of the Interior; and thereby qualified itself to become a specific grantee of the benefits provided by that act (R., 9).

On June 10, 1887, it duly adopted its route, between the points named, and thereafter filed in the local office at Boise City, Idaho, profile or map, in duplicate, of its said line of road, the same passing over and through the tract of land hereinafter mentioned, and said map was duly approved by the Secretary of the Interior, February 17, 1888. The railroad from Nampa to Boise was constructed along and upon said route prior to, and was in operation upon, September 1, 1888 (R., 9-10).

On August 6, 1888, the company ratified the survey of the certain plat of station grounds involved herein, and authorized its president to present same to the Secretary of the Interior for approval (R., 11-12).

On September 12, 1888, the company filed, in said local office at Boise, a profile map, *in duplicate,* which included the tract of land involved in this case, claiming the same as station grounds for

station buildings, turnouts, side tracks, depot, and water station, which map was transmitted by said local office to the Secretary of the Interior and filed in the latter office September 20, 1888, and approved by the Secretary December 15, 1888, and then returned to said local office (R., 9-10).

(NOTE.—A copy of said plat of station grounds was introduced in evidence below (R., 10-11), but plaintiffs in error have failed to include it in the record.)

On October 18, 1888, one Joseph G. Reed, a qualified pre-emptor, filed in said local office at Boise declaratory statement No. 4011 for the E. ½ S. W. ¼ and the W. ½ S. E. ¼, sec. 7, T. 3 N., R. 1 E., B. M. (which included the certain strip here in controversy), alleging settlement on the same day. On April 24, 1889, Reed made final proof, and patent issued to him August 4, 1891 (R., 9).

All lands in this township were surveyed and opened to entry July 1, 1875 (R., 9).

Upon the return to the local office at Boise of the plat of station grounds, after the approval thereof by the Secretary of the Interior, the local officers failed, then and thereafter, to note the same upon the plats of that office, and at all times since the commencement of this action said plat has been missing from said land office and cannot be found (R., 11).

(NOTE.—There is neither allegation nor proof that the *original* of the approved plat of station grounds was not noted on the tract books of the General Land Office, nor that said original approved plat is missing from the files of the Interior Department. The latter Department, after approval of such maps, returns *copy* to the local office, and that copy was thereafter lost. Just when it was lost nowhere appears herein, save that *at all times since the commencement of this action it has been missing from the files of the local office and cannot be found.*)

Plaintiffs in error claim under conveyance from one Rowan, March 30, 1901, to whom said Reed had conveyed, July 27, 1889, prior to the issuance of Government patent, on August 4, 1891 (R., 4, 10).

In addition to the foregoing, it may be noted that one of the plaintiffs in error, A. R. Stalker, testified that, at the time he purchased the land in controversy, the railroad company was maintaining one side track, a depot building, and a small building upon its right of way adjacent to the tract of land claimed by it as station grounds (R., 12). It has already been shown that the railroad line had been constructed and operated on and prior to September 1, 1888, and that that line passes over and through the tract of land so entered by Reed (R., 9-10).

In short, there is and can here be no question as

to the right of the company to its right of way for railroad line, namely, its tracks, which were constructed and have been and are operated for railroad purposes across the tract of land so entered by Reed (Brief of Plaintiff in Error, p. 12); the only question involved is as to the right of the company under its approved plat of right of way for station grounds adjacent to its said tracks, the same embracing an area of 410 by 1304.2 feet, as far as it conflicts with the claims of plaintiffs in error herein.

No proof was offered by plaintiffs in error as to whether the final certificate issued to Reed, the pre-emptor, on April 24, 1889, did or did not contain a notation of the reservation of the railroad right of way for its line of railroad and for station grounds across and upon the tract so entered by him, or whether the Government patent, subsequently issued under said pre-emption entry, on August 4, 1891, did or did not contain such reservation, the sole fact established by plaintiffs in error being that the certain copy of the approved plat of station grounds returned to the local office was lost by that office prior to the commencement of this suit (but how long prior thereto does not appear), and that said plat was not noted upon the plats of said local office.

I.

The Railroad Right-of-way Act of March 3, 1875, and Departmental Regulations Issued Thereunder.

The act of March 3, 1875 (18 Stats., 482), granting to railroads the right of way through public lands of the United States, thus provides:

> "SECTION 1. That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized * * * which shall have filed with the Secretary of the Interior a copy of its articles of incorporation and due proofs of organization under the same, to the extent of one hundred feet on each side of the central line of said road; also, the right to take, from the public lands adjacent to the line of said road, material, earth, stone and timber necessary for the construction of said road; also, ground adjacent to such right of way for station buildings, depots, machine shops, side tracks, turnouts and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road."
>
> "SECTION 4. That any railroad company desiring to secure the benefits of this act shall, * * * file with the register of the land office for the district where such land is located a profile of its road; and, upon approval thereof by the Secretary of the Interior, the same shall be noted upon the plats in said office, and thereafter all such lands over which such right of way shall

> pass shall be disposed of subject to such right of way: *Provided,* That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road."

While it is suggested in the opinion of the court below that said act provides for the filing of a profile of the line of road, but that the requirement as to filing a profile or plat of station grounds is only found in the departmental regulations promulgated thereunder, nevertheless the act itself would seem to be fairly applicable to both classes of profiles or maps, line of railroad or station grounds, the detail of procedure in each class being more particularly prescribed in said departmental regulations, since, in section 4 of the act, it is stated that

> "any railroad company desiring to secure the benefits of this act, shall, * * * file with the register of the land office for the district where such land is located, a profile of its road," etc.

The *benefits* provided by the act are found in section 1, and they cover not only the railroad right of way proper, but also grounds adjacent thereto for station buildings, etc. However, if there be any distinction between the two classes of benefit (*i. e.*, railroad line and station grounds), it is not believed to be here controlling.

The departmental regulations under said act of 1875, and in force at the time of the several transactions set forth in this record, were those approved January 13, 1888 (12 L D., 423-429).

Those regulations required, as to approved map of *line of road,* that, under the certain conditions therein stated, the local officers note, in red ink, across the face of certificate of entry, that the same is allowed subject to the right of way of the road, giving its name.

The same regulations required, as to *station grounds,* that the applicant company must file for approval a plat, showing, in connection with the public surveys, the surveyed limits and area of the grounds desired (such plat to contain certain affidavits and certificates, not here important); that when maps of the line of any road have been approved by the Secretary of the Interior, a *copy* of so much thereof as relates to the lands within the boundaries of a given district will be transmitted to the local register and receiver; and that when copy of an approved plat of ground selected by a company for station purposes, etc., is received in the local office, the latter will mark the proper township plat accordingly, and make the necessary notes on the tract books; and, in disposing of the tracts which may include the grounds so selected, the officers will note on the *certificate of entry,* in addition to the note concerning right of way, that the entry is permitted subject to the use and occupation of the company (naming it) for station purposes, etc.

Those regulations further provided that any person settling on the public lands to which a railroad right of way has attached *takes the same subject thereto,* and must pay for the *full area* of the subdivision entered.

From the above it sufficiently appears that the certificate issued upon any final entry was, at the times here in question, required to be indorsed, in red ink, across its face, by the local officers with a notation of the reservation of the railroad right of way, both as to the railroad line and the station grounds.

The Government patents are written from such certificates of entry, and hence such patents necessarily contained an express reservation of the railroad rights.

Now, a significant fact in this case is that while it is stipulated in the record that this particular plat of station grounds was not noted by the local officers upon the plats in their office; there is nothing whatever in the record to show that such reservation of railroad right of way, both as to the railroad line proper and as to said station grounds, was not noted upon the certificate of entry that issued to Reed, April 24, 1889, or that such reservation was not itself appropriately inserted in the patent that issued to him August 4, 1891 (R., 37).

It is further significant that while A. R. Stalker, one of the plaintiffs in error, in the very brief testimony given by him, stated that, at the time he purchased the lots in question, he had no knowl-

edge that the property was claimed by the railroad company (R., 12), it is, nevertheless, admitted that the railroad was then and theretofore constructed and operated across the land, and that the company was, at the time he purchased, maintaining one side track, a depot building, and a small building upon its right of way adjacent to the tract claimed by it as station grounds (*supra*). He did not, however, undertake to state, and nowhere does it appear, that the Government patentee, Reed, did not have such knowledge, or that the reservation of the railroad rights was not in fact indorsed upon his certificate of entry and inserted in the patent subsequently issued to him thereunder.

The opinion below calls attention to this matter, and says of it that while there is nothing in the record to show whether the final certificate to Reed or his patent was expressly subject to the railroad's right of way or station grounds: "*it does not appear that the final certificate or patent did not contain such reservations*" (R., 37). (Italics by counsel.)

Applying the maxim *omnia præsumuntur recte esse acta*, and there being nothing in this record to show that the local officers in this case failed or neglected to indorse upon Reed's certificate of entry the reservation of the railroad rights, or that such reservation was not inserted in the patent that thereafter issued to him, it must result that it will be presumed in this case that all things that

were required to be done in this behalf were regularly and properly done (Smelting Co. *vs.* Kemp, 104 U. S., 636, 646).

But aside from this, it would not seem to be at all controlling herein whether said final certificate and patent issued thereunder to Reed did or did not contain such reservation of the railroad rights, as has been repeatedly held.

The practice of inserting such notation and reservation hereinabove pointed out obtained until about February, 1895 (upwards of four years after the issuance of said patent to Reed), when there was presented, in the appeal of one Mary G. Arnett, the question whether, in order to protect the railroad rights, it was necessary to note such reservation on certificates of entry or in patents issued thereunder, it being contended in that case that the general right-of-way act of March 3, 1875, contained a legislative declaration of the reservation of the right of way to such railroad companies as may have complied with the provisions of that law, and that therefore the insertion of the right-of-way clause answered no purpose except to embarrass the settler, while leaving it out could not affect the right of way of the railroad company under said act (20 L. D., 131).

In the departmental decision just referred to the soundness of that contention was upheld, and it was held that, in cases under the general right-of-way act of March 3, 1875, the notation and reservation of the railroad right of way was not nec-

essary. From that time on the former practice in that regard apparently ceased, and departmental regulations subsequently issued omitted the former directions in that regard.

It may be remarked that said decision further held that there were other cases where it would be proper to insert such reservation of railroad rights of way, namely, where the grant of right of way is found in a special act of Congress to an individual company, and where such special act does not itself contain a legislative declaration of reservation of the railroad rights in respect of lands affected thereby. In such cases the decision affirmed the propriety of inserting such express reservation.

The rule announced in the Arnett case has ever since been adhered to in the Department (Denver & Rio Grande *vs.* Clark, 29 L. D., 478). See also Jamestown & Northern R. R. Co. *vs.* Jones, 177 U. S., 125.

To summarize: In the absence of any showing to the contrary (and there is none in the record), it will be *presumed* that the local officers properly and regularly discharged their official duties in respect of noting the reservation of the railroad rights upon Reed's certificate of entry, and that the patent issued under such certificate likewise contained such reservation, and this, too, even though it does appear that said local officers failed to note the reservation upon the plats of their office, since a mere failure to so note upon

their office plats raises no inference or presumption that they further failed or neglected to note the same by indorsement upon the certificate of Reed's entry.

Nor can any presumption be indulged in adverse to the railroad company by reason of the loss by the local office of the copy of the approved plat of station grounds. The record does not show when the loss of that copy occurred—the record simply states that "at all times since the commencement of this action said profile or map has been missing from the United States Land Office and cannot be found" (R., 11)—*non constat* said profile or plat had not been lost, but was properly on file and accessible in said local office at the time of said final certificate of entry, in 1889, and at the time of patent issued thereunder, in 1891.

The time of the commencement of this action was very many years subsequent to 1889 and 1891. (The record does not clearly indicate just when this suit was filed, but it was probably in or about 1905. R., 10.)

Hence, the *presumption* is entirely in favor of the certificate of Reed's entry and the patent issued thereunder being in compliance with the then regulations and practice in that regard; and even if the fact had been or is otherwise, the result would be the same, as to the railroad rights, since the right-of-way act of March 3, 1875, contained a legislative declaration of the reservation of the railroad right of way, which, from and after the

Arnett case, *supra*, induced the Department to change its former regulations and practice in that regard, and to thereafter entirely dispense with, as entirely unnecessary, the insertion of such notations of reservation of railroad rights upon certificates of entry and in patents issued thereunder.

II.

Issuance of Final Certificate of Entry to Reed and of Patent Thereunder was not an Adverse Adjudication of the Railroad Rights.

In the brief on behalf of plaintiffs in error considerable stress is laid upon the proposition that the claim of the railroad company was *adversely* determined at the time of final proof submitted by Reed, and when (so states the brief) the railroad company permitted its claim to go by default, it being further suggested in said brief that the railroad company is now seeking to do what it should have done when "regularly cited" in the Land Department when Reed made final proof.

What that means is simply this, that before submitting final proof Reed was required, under the law and departmental regulations, to publish a notice of his intention to make such final proof; and, therefore, said counsel insists that that was an invitation, as well as a citation, to any and all parties to appear and show cause why his entry should not be allowed.

In support of that proposition said brief cites several decisions of the Department of the Interior which, from a reading of the very brief extracts therefrom as set forth in said brief, would seem to indicate that the Department has laid down the bald proposition that even lands granted to a railroad company within primary limits may be taken away from a railroad grantee, provided the latter does not appear and make contest, and this upon a mere general publication notice that some settler proposed, on a given day, to submit final proofs, and that thereafter the matter would be *res judicata* against the railroad grantee.

Of course, the Department has never laid down any such proposition.

Take, for example, the case of Northern Pacific *vs.* Dow (8 L. D., 389), one of the cases cited in said brief, and as to which it is therein stated that the Department held that failure of a railroad company to appear in response to final-proof notice, given in accordance with the act of March 3, 1879, and to assert its right to land claimed by virtue of its being within *granted* limits, precludes the subsequent assertion of such right.

An examination of the opinion in that case will disclose that it was held that the tract in question, within granted limits, was excepted from the railroad grant because of the fact that it was included within a pre-emption settlement *prior* to the grant, followed by pre-emption filing within

the time by law allowed therefor after the filing of plat of survey of the township in the local office.

That is a very different proposition from asserting that the mere failure of a railroad company to appear in response to a general public notice of submission of final proof, and of which the railroad grantee may never have had actual notice, will, nevertheless, operate to extinguish the title of the railroad grantee to lands within its granted limits, and which were not excepted from the grant, in favor of one whose claim thereto was initiated *subsequent* to the date when the rights of the railroad grantee attached to the tract.

So, too, in the case of Catlin *vs.* Northern Pacific (9 L. D., 423), cited by plaintiff in error to the same proposition, it was expressly held that the failure of the company to appear will *not* warrant an award to the settler of land shown by the record to have passed under the railroad grant.

Further comment on this line of authorities is quite unnecessary.

The pertinency of the proposition so urged by plaintiff in error is not clear. It amounts simply to this, that the acceptance by the local office of final proof by Reed, and the issuance of certificate of entry thereunder, followed thereafter by patent, is, in necessary legal effect, an adjudication adverse to the railroad rights; as to all of which, it is suggested, the railroad made default in respect of its right to be heard in opposition when cited to appear.

But is there here any room for the application of any such presumption? The record itself is entirely silent as to whether the railroad did or did not appear when the final proofs were offered; but, as already shown, the *legal presumption* is that the local officers regularly and properly performed their duty and noted upon the certificate of entry, in red ink, across its face, an indorsement of reservation of the railroad rights, and the further presumption that patent thereafter issued in accordance therewith.

And, moreover, there would have been no occasion for the railroad to appear in response to such publication notice, since its rights were initiated *prior* to the settlement claim of Reed, and the latter necessarily acquired his rights subject thereto; and the mere fact that Reed was seeking patent for the fee of the land, and to which he was entitled, was not, even presumptively, the assertion by him of a claim adverse to the railroad company.

The statute protected the railroad company and itself reserved its rights as against the subsequent settler and patentee.

Furthermore, neither the issuance of certificate of entry nor the patent thereunder constituted an adjudication adverse to the railroad rights, since it has never been suggested in any case that the existence of a railroad right of way, or station grounds in connection therewith, operates to prevent the patenting to a settler of the fee to the

lands affected thereby. The railroad right-of-way act itself particularly provides for exactly that situation, and it is now thoroughly settled that, in such case, the patentee takes his land subject to the railroad right of way, and this even though the reservation of the railroad rights is not expressly set forth or stated in his patent (Jamestown & Northern R. R. Co. *vs.* Jones, *supra*).

Hence, Reed's certificate of entry and the patent thereunder, in and of themselves, accomplished nothing as *res judicata* against the railroad company.

III.

In conclusion, it is submitted that the decision below was clearly right and should be *affirmed.*

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